

REPORTS OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

BY

S. J. VANKOUGHNET,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

VOL. XLIII.

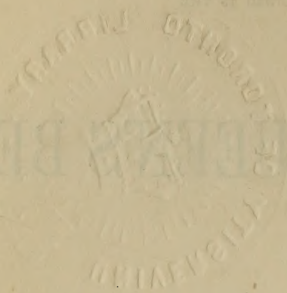
CONTAINING THE CASES DETERMINED
FROM HILARY TERM, 41 VICTORIA, TO MICHAELMAS TERM, 42 VICTORIA,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

TORONTO:
ROWSSELL & HUTCHISON.
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REPORTER AT LAW AND ATTORNEY AT THE COURT

CHRISTOPHER ROBINSON, Q.C.

ROWSELL AND HUTCHISON, LAW PRINTERS, TORONTO.

VOL. XLII.

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J U D G E S
OF THE
C O U R T O F Q U E E N ' S B E N C H

DURING THE PERIOD OF THESE REPORTS.

THE HON. ROBERT ALEXANDER HARRISON, C. J.
" " JOHN HAWKINS HAGARTY, C. J.
" " ADAM WILSON, J.
" " JOHN DOUGLAS ARMOUR, J.
" " MATTHEW CROOKS CAMERON, J.

Attorney-General :
THE HON. OLIVER MOWAT.

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REPORTS OF CASES IN THE COURT OF QUEEN'S BENCH.

HILARY TERM, 41 VICTORIA, 1878.

From February 4th to February 23rd.

Present:

THE HON. ROBERT ALEXANDER HARRISON, C. J.

“ “ ADAM WILSON, J.

“ “ JOHN DOUGLAS ARMOUR, J.

GEORGE WELLINGTON STEVENS v. DANIEL BUCK.

*Ejectment—Letters patent for adjoining lots—Description of land—
Estoppel—Adding equitable defence in term.*

Ejectment to recover a piece of land claimed by plaintiff as part of lot 3 and by defendant as part of lot 4, both claiming under the letters patent for the respective lots. The plaintiff's patent issued on 2nd January, 1874, and granted it as lot 3, containing 85 acres, without any description by metes and bounds. The defendant's patent issued on the 8th December, 1875, granted his lot as lot 4, containing 23 acres, without any specific description. It appeared that the piece in question, though not so laid out on the ground, would, according to the field notes and plan made on the original survey, have formed part of lot 4; but that the Crown Lands Department had subsequently erased a portion of the division line between the lots, and that the grants were evidently made according to the plan so altered; and that, including the land in question, lot 3 would just consist of 85 acres, while lot 4, exclusive of the piece, would consist of 23 acres. *Held*, that the piece in dispute was granted as part of lot 3.

It appeared, however, that the defendant, though his patent was subsequent to the plaintiff's, was the first to purchase from the Crown: and that he and plaintiff had been occupying the respective lots for some years previous to the issue of either patent: that the piece in dispute was sold by the Crown Lands' agent to defendant as part of lot 4, and that he then took possession of it as such, continued to occupy it without any objection from plaintiff, and cleared a large portion thereof, and erected a house and barn thereon of much greater value than the land itself: that plaintiff, when applying for his patent, filed an application made by defendant that there was no one in adverse possession of lot 3, upon which the lot, including this piece, was granted to the plaintiff.

Held, that the plaintiff was estopped in equity from setting up title to the land in question as being part of lot 3; and an equitable defence, setting out these facts, was directed to be added, and a verdict to be entered thereon for the defendant.

EJECTMENT for the recovery of possession of lot 3, in the 2nd concession of the township of Stanhope, in the county of Haliburton.

The plaintiff claimed title under the patent from the Crown.

The defendant, besides denying the title of the plaintiff, asserted title to the land as being part of lot 4 in the 2nd concession of Stanhope, William Buck, claiming as owner under deed from Mary and Daniel Buck, being the patentee from the Crown of said lot 4.

The cause was tried at the last Fall Assizes, at Lindsay, before Hagarty, C. J. C. P., without a jury.

The piece of land in dispute was about fifteen acres, shewn on the subjoined plan, and marked "A." (See plan on opposite page.)

The plaintiff claimed it as being a portion of lot 3, as described in the grant from the Crown, and the defendant claimed it as being part of lot 4, as described in the grant from the Crown.

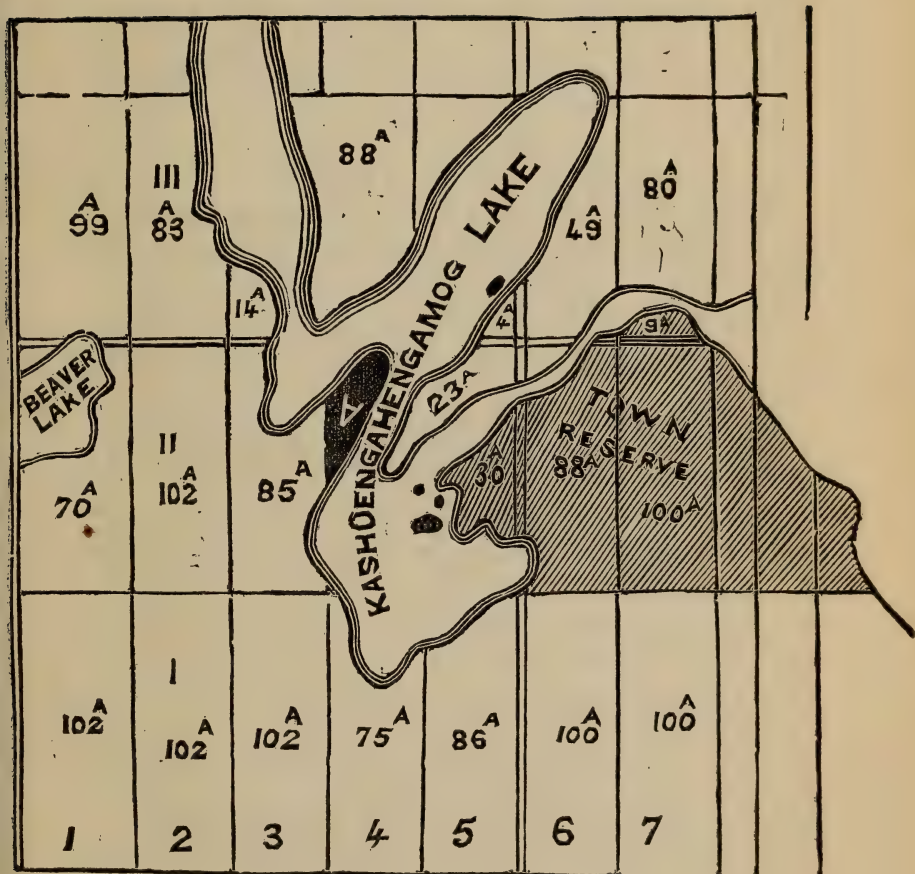
The defendant had been in occupation of it as being a part of lot 4 for about thirteen years, and bought it from the Crown Lands agent as being a part of lot 4.

The plaintiff, who purchased lot 3 four or five years ago, did not claim the piece in dispute until recently as a part of lot 3, and when he made his application for letters patent, obtained and filed an affidavit from the defendant that there was no one in adverse occupation of lot 3.

The defendant at this time was not only living on the land in dispute, but had erected a house and barn on it, and had cleared about ten acres of it.

If the line between lots 3 and 4 in the 1st concession were projected in a straight line so as to make parallelograms of the lots, the land in question would be beyond doubt a portion of lot 3.

The original plan of the township as first prepared shewed this line projected, but afterwards the projected line was erased, so that it does not now appear on the original plan.



A copy of the plan, supplied to the local agent for the purposes of sale, by mistake, shewed the projected line, and the defendant bought and occupied in accordance with it.

The alterations in the plan made lot 3 consist of what, according to the plan, originally was portions of lots 3 and 4, and lot 4 to consist of what was portions of lots 4 and 5.

The township of Stanhope was surveyed in 1860. The plan, shewing the lots in parallelograms, and field notes were shortly afterwards returned to the Crown Lands Department. These were, according to the practice of the department, sent to the deputy surveyor's office to be examined.

It was found that no post had been planted for lot 4, and so thirteen and a half acres were added to the seventy-two acres shewn on the plan as being lot 3, the addition making lot 3 to be about eighty-five acres as now shewn on the plan, and leaving lot 4 only 23 acres as also shewn on the plan.

There did not appear to have been any intention on the part of the Crown to convey the land covered with water either as a part of lot 3 or lot 4.

The patent for lot 3 to George Wellington Stevens was issued on the 2nd of January, 1874. It recited that George Wellington Stevens had contracted and agreed for the absolute purchase of the land and premises after mentioned and described at and for the price of \$17. It did not contain any description by metes and bounds. It simply described the lot "as lot number three in the second concession of the said township of Stanhope," containing eighty-five acres, be the same more or less, "reserving the road allowance along the bank of Kashoengahengamog lake."

The patent for lot 4 to Mary Buck was issued on the 8th of December, 1875, and was for twenty-three acres. It contained a similar recital to the prior patent, and stated the price to be \$23. It contained no metes and bounds, and made no reference to Kashoengahengamog lake.

It simply described the land as being "Lot number four in the second concession of the township of Stanhope afore-

said," containing by admeasurement twenty-three acres, be the same more or less. Lot 3, according to actual measurement, contained $87 \frac{39}{100}$ acres. This was exclusive of the road allowance around the lake shore. The road, if added, would make something like ten acres more. The tongue of land in dispute if deducted would make $15 \frac{15}{100}$ acres less.

The evidence shewed that the plaintiff or his agent, before action, refused to make any compensation whatever to the defendant for his improvements. The learned Chief Justice found a verdict for the plaintiff.

During Michaelmas term last, March 10, 1872, *M. C. Cameron*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict entered for the plaintiff should not be set aside and a verdict entered for the defendant, pursuant to the Law Reform Act, on the ground that the said verdict was contrary to law and evidence.

During last term, February 8, 1878, *J. K. Kerr*, Q. C., shewed cause. He cited *Juson v. Reynolds*, 34 U. C. R. 174, 197, 199; *Carrick v. Johnston*, 26 U. C. R. 69; *Davis v. McPherson*, 33 U. C. R. 376; *Wigle v. Stewart*, 28 U. C. R. 427; *Harrison v. Frost*, 34 U. C. R. 110; *Gillen v. Haynes*, 33 U. C. R. 516; *O'Donnell v. Tiernan*, 35 U. C. R. 181.

M. C. Cameron, Q. C., contra.

March 15, 1878. HARRISON, C. J., delivered the judgment of the Court.

The first question which we propose to consider is, whether the plaintiff, under his letters patent, is legally entitled to recover possession of the parcel of land in dispute.

If we should be of opinion in the affirmative, it will become necessary to consider some other questions, to which we shall hereafter advert.

An examination of the cases bearing on this question will disclose the principles which should govern us in the present enquiry.

It is usual for the Crown in this Province, before selling any of the public demesne, to have a survey made of it into

concessions and lots, with appropriate numbers or other appropriate descriptions.

It is also usual for the surveyor when making the survey to place posts or other suitable monuments, so as to designate the concessions and lots on the ground.

It is also usual for the surveyor to report his work to the Crown Lands Department, and to accompany the report with his field notes and a plan shewing the survey in detail.

It is competent to the Crown to adopt or reject the survey; but when it adopts it, with or without amendment, and makes grants in pursuance of it, these grants are controlled by the survey: *Martin v. Crow*, 22 U. C. R. 485.

In deciding conflicting claims between the grantees of the Crown or those claiming under them, it is necessary to have regard not only to the language of the grants, but to the actual work on the ground if the same can be traced: *Dunn v. Turner*, 3 U. C. R. 104; *Carrick v. Johnston*, 26 U. C. R. 69; *Smith v. Clunas et al.*, 20 C. P. 213.

If there be no work on the ground, the plan, as adopted, may be held to govern; but where there is work on the ground, and the latter is inconsistent with the plan, the work on the ground must govern: *Carrick v. Johnson*, 26 U. C. R. 69. See further *Juson et al. v. Reynolds*, 34 U. C. R. 174, 199.

If the plan and the grant conflict it may be that the grant would be, in some measure, controlled by the plan; but where both agree, and there is no evidence of work on the ground, effect must be given to the grant according to the description therein contained, so far as the same can be traced on the ground: *McEachern v. Somerville*, 37 U. C. R. 609, 620.

The description in the grant may be so worded as to be entirely controlled by the plan: *O'Donnell v. Tiernan*, 35 U. C. R. 181.

All lands are supposed to be actually surveyed, and the intention of the grant, unless the contrary plainly appears, must be held to convey the land according to the actual

survey: *Martin v. Crow*, 22 U. C. R. 485; *McGregor v. McMichael*, 41 U. C. R. 128.

If a survey has been made, but inaccurately, and there be no evidence of work on the ground, the inaccurate survey must yield to a subsequent accurate one, for in law the angles of a lot must be considered to be ascertainable with mathematical certainty: *Thibaudeau v. Skead*, 39 U. C. R. 387; *Forsyth v. Boyle*, 28 C. P. 26, 33.

Where the question is as to the construction of a particular grant from the Crown, other grants from the Crown may be received to assist in the construction: *Clark v. Bonnycastle*, 3 O. S. 528. But where the construction of the first grant is clear, a subsequent grant cannot be allowed to control it: *Davis et al. v. McPherson*, 33 U. C. R. 376; *Martin v. Crow*, 22 U. C. R. 485; *Harrison v. Frost*, 34 U. C. R. 110.

If a lot be granted by a certain name, and it be clearly shewn what the lot so named contains, the lot as named is the governing feature in the description: *Iler v. Nolan*, 21 U. C. R. 309, 319.

Where a particular description is given as by metes and bounds, and the latter is inconsistent with the description of the lot as named in the grant, the particular description must be set aside: *Jamieson v. McCollum*, 18 U. C. R. 445; *Wigle v. Stewart*, 28 U. C. R. 427; *Gillen v. Haynes*, 33 U. C. R. 516; *Haynes v. Gillen*, 21 Grant 15.

The grant under which the plaintiff claims was the first issued. It describes the land granted as being "Lot number three in the second concession of the said township of Stanhope, reserving the road allowance along the bank of Kas-hoengahengamog lake." This points to the fact of an original survey, and that the lot intended to be granted adjoins or abuts on the lake named. Besides, the grant calls for eighty-five acres, be the same more or less. When we refer to the plan of the original survey in the Crown Lands Department, we find the lake and discover a lot, such as described, abutting on that lake. Including the piece of land in dispute, there are about eighty-five acres. Exclu-

ding it there is much less. The inference is irresistible that the Crown intended to grant, and did grant, the piece in dispute as a portion of lot 3.

This conclusion is strengthened if we refer to the grant under which the defendant claims, and which was not issued till the 18th of December, 1875. It grants "Lot number four in the second concession of the township of Stanhope, aforesaid," containing by admeasurement twenty-three acres, be the same more or less. If we refer to the plan and exclude the piece in dispute, lot 4, as now shewn on the plan, contains about twenty-three acres. If we add the piece in dispute it will contain about forty-eight acres.

There is no variance between the plan as it now appears and these grants. The line which was projected by the surveyor between lots 3 and 4 has been erased, and the grants evidently made according to the plan as altered. We must therefore assume that this was done by the authority of the Crown Lands Department before either grant was made. The right of the Crown before grant of the land to make such an alteration, where there is no work on the ground at variance with it, cannot be doubted. There is no evidence of any work on the ground at variance with the plan as altered, or the grants. The only conclusion possible under these circumstances is, that the plaintiff has the legal right to recover.

But are there not circumstances which would prevent his recovery in a Court of equity? It is shewn that the defendant was the first to purchase from the Crown. The evidence also shews that the plaintiff and the defendant were occupying the two lots for some years before the issue of either of the letters patent: that the plaintiff never objected to the defendant occupying the piece in dispute as being a portion of lot 4: that it was sold by the local Crown Lands agent as a portion of lot 4: that the defendant, with the knowledge of plaintiff, proceeded to occupy and did occupy it as being a portion of lot 4: that defendant not only cleared a large portion of it, but put up a house and barn on it of much greater value than the money

value of the land: that the plaintiff did not up to this time dispute defendant's right to occupy it as being a portion of lot 4: that the plaintiff when applying for his grant of lot 3 filed an affidavit that there was no claim of any person in adverse possession of that lot: that the Crown believing this statement to be true granted letters patent for the whole of lot 3, including the parcel in dispute, to the plaintiff; and that the plaintiff has taken advantage of the grant so issued to attempt to eject the defendant without payment for his improvements.

If the plaintiff when he made his application for the grant really intended to procure a patent for the piece of land in dispute as being a portion of lot 3, and from his subsequent conduct we may infer that he did, he was guilty of fraud both as regards the Crown and the defendant.

It is the duty of persons dealing with the Crown Lands Department to be fair and candid in all their communications and statements. If the Crown had at the time of the application by the plaintiff for the patent known of the adverse claim of the defendant to the land in dispute, the Crown certainly would not have issued the patent to the plaintiff without at least making some provision for the payment of the improvements made by the defendant. Had the defendant known the use which the plaintiff was about to make of his affidavit, the affidavit would certainly not have been made. We cannot doubt that in such a case a Court of equity would, on a proper application, set aside the plaintiff's patent, or so much of it as prejudicially affects the defendant. See *Lawrence v. Pomeroy*, 9 Grant 474; *Mahon v. McLean*, 13 Grant 361.

Independently of this it appears to us the defendant has a clear equity to restrain the plaintiff's action.

It is, as said by Lord Campbell in *Cairncross v. Lorimer*, 7 Jur. N. S. 149, a universal law that "if a man, either by words or conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without

his consent, and he thereby induces others to do that from which they might otherwise have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct."

Brett, J., in *Carr v. London and North-Western R. W. Co.*, L. R. 10 C. P. 307, 317, said: "If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he, with such belief, does act in that way to his damage, the first is estopped from denying that the facts were as represented."

Hence, if a stranger begins to build on land supposing it to be his own, and the real owner perceiving his mistake abstains from setting him right, and leaves him to persevere in his error, a Court of equity will not afterwards allow the real owner to assert his title to the land: *Ramsden v. Dyson et al.*, L. R. 1 H. L. 129.

The rule that a party in good faith making improvements on land which he supposed to be his own, whether he has a lien on it or not, will not, be allowed to be disturbed in possession, even if his title prove bad, is one actively to be enforced in equity, even although no action has been brought to interfere with the possession: *Gummerson v. Banting*, 18 Grant 516.

These cases were noticed in *Acheson v. McMurray et al.*, 41 U. C. R. 484, 493, where I said: "I entertain no doubt that in equity the plaintiff, without payment of the value of the defendant's improvements, ought to be restrained from disturbing the possession as he is attempting to do by the present action of ejectment."

To these cases may be added *Rutherford v. Tracy*, 8 Am. 104, 107, where Wagner, J., said: "If the grantor shewed the purchaser the wrong lines, and was cognizant of his acting on that information, and stood silent while a house was being erected, and money expended, he directly led the

purchaser into a line of conduct prejudicial to his interest, and should not now be heard in alleging anything to the contrary. Such facts would constitute an estoppel *in pais*."

If in this case, as in *Acheson v. McMurray*, 41 U. C. R. 484, there were an equitable defence pleaded, we would conceive it to be our duty at once to give effect to it, and to enter a verdict for the defendant.

But as it is the Court is not powerless to prevent the commission of so glaring an act of injustice as is now attempted.

In the first place the second section of the Administration of Justice Act declares that "For the more speedy, convenient, and *inexpensive* administration of justice in *every* case, the Courts of law and equity shall be, as far as possible, *auxiliary* to one another respectively": R. S., O. ch. 49.

In the second place, it is by section 8 of the same Act declared that "At any time during the progress of any action, suit, or other proceeding at law or in equity, the Court or a Judge *may*, upon the application of any of the parties, or *without any such application*, make all amendments as may seem necessary for the advancement of justice, the prevention and redress of fraud, the determining the rights and interests of the respective parties, and of the real question in controversy between them, and best calculated to secure the giving of judgment according to the *very right and justice of the case*."

In the third place it is by sub-sec. 3 of sec. 8 of the same Act declared, that "All such amendments *shall* be made upon such terms as to payment of costs and otherwise, as to the Court or Judge ordering the same to be made seems just."

The land in dispute, apart from the improvements made upon it by the defendant, does not appear to be of much pecuniary value. The defendant does not appear to be a man of much pecuniary means. The action is brought against him to dispossess him from land which he has long occupied, and upon which he has made improvements.

with the knowledge of the plaintiff, and without any offer by the plaintiff to pay for the improvements.

The defendant was the first to buy from the Crown, and bought from the local Crown Lands agent as part of lot 4 the land now sought to be recovered under the patent, describing it as part of lot 3. This patent, if the facts were known to the Crown at the time of its issue which are now known to us, would never have been issued in such a form to the plaintiff. The very right and justice of the case are strongly with the defendant, and so unequivocally so that if we have the power to prevent the success of the wrong attempted, and should not exercise the power, we would feel like being accessories to the wrong.

It cannot be doubted that under the language used in the statute we have the power to allow such an amendment as will prevent the perpetration of the attempted fraud and do justice between the parties, and this being so, we feel that it is our duty to direct the amendment to be made.

We therefore direct that the defendant shall be at liberty without costs to plead an equitable plea, such as we have suggested, and to join issue thereon for the plaintiff; and upon the same being done, we further direct that the rule *nisi* be made absolute to enter the verdict for the defendant. See *Howeren v. Bradburn*, 22 Grant 96; *Shannon v. The Gore District Mutual Fire Ins. Co.*, 40 U. C. R. 188, 205.

Rule accordingly.

IN THE MATTER OF THOMAS BLAIR BROWNING AND THE
JUDGE OF THE COUNTY COURT OF THE COUNTY OF
WENTWORTH, AND THE CLERK OF THE MUNICIPALITY
OF THE TOWN OF DUNDAS.

*Voters' list—Application for mandamus to correct—39 V. ch. 11, s. 5,
40 V. ch. 10, s. 1, O.*

Under 39 Vic. ch. 11, sec. 5, O., as amended by 40 Vic. ch. 10, sec. 1, O., persons qualified to vote, whose names are omitted from the voters' list, must, in order to have the omission rectified, notify the clerk of the municipality within thirty days after the posting by him of the said list, of their intention to make application therefor.

In this case the applicant's name, which was properly on the assessment roll for income, was, without any notice to him, erased by the Court of Revision, and was in consequence omitted by the clerk from the voters' list. The applicant did not discover the omission until after the expiration of the thirty days, when he made application to the clerk to have his name inserted in the list, and on his refusal to do so, he applied for a mandamus to the County Judge and clerk to make the insertion.

Held, that the application must be refused.

THE applicant, in person, on 22nd November, 1877, during Michaelmas term last, obtained a rule—upon reading the list of voters for the town of Dundas for the year 1877, the demand served on the clerk of the municipality of that town, his reply thereto, and other papers filed—calling upon the County Judge and the clerk of the town to shew cause why a writ of mandamus should not issue, directed to them, under the provisions of the statutes of Ontario, 39 Vic. ch. 11, sec. 11, and other sections of the said Act, and of 37 Vic. ch. 3, sec. 3, commanding them to place the name of the applicant on the voters' list of the municipality of the town of Dundas.

The applicant was properly assessed in the town of Dundas for \$600 income, and his name appeared on the assessment roll for 1877, accordingly.

The Court of Revision for the town for the year 1877, without any notice to the applicant, authorized the erasure of the applicant's name from the assessment roll, and the amount of income set opposite to it.

The consequence was, that the applicant's name did not appear on the voters' list of the town for that year, which list

was placed up in the requisite public offices in the month of August, 1877. The applicant, not having examined any of the lists, only discovered that his name did not appear on the voters' list for Dundas on or about 10th October, 1877.

He thereupon searched the assessment roll, and found two red lines drawn through his name, and assessment in respect of income on the roll, and the initials "E. W.," being the initials of the clerk of the town, annexed to the same.

The applicant then made a demand on the clerk to place his name on the voters' list in respect of income, but the clerk refused.

On 12th October, 1877, the applicant made application to the learned Judge of the County Court of Wentworth for and obtained a summons calling on the clerk to produce the assessment roll, and submit to be examined, and that the learned Judge should make such order therefor as might be deemed necessary for the purpose of placing the name of the applicant upon the voters' list in respect of income.

Pursuant to the summons, the clerk produced the assessment roll, and was examined by the learned County Judge on the 19th October, 1877; but the learned Judge, after argument, delivered judgment refusing the application.

The applicant, on the 1st November, 1877, again made a written demand upon the clerk of the town to place his name upon the voters' list of the town for 1877, in respect of income; but this the clerk again refused in writing, saying, "The voters' list is now beyond my control, and I have no authority to place your name on the said voters' list, the County Judge having finally revised the same."

In this term, February 14, 1878, *Walker* shewed cause for the County Judge. He admitted that if sec. 8 of 32 Vic. cap. 21, O., were still in force, the applicant would be right in his contention; but as that Act was repealed, and a different procedure now provided by 39 Vic. ch. 11, he submitted the County Judge was right in holding he had no

jurisdiction to grant the application; and that this being so, the Court ought not to issue a mandamus compelling the exercise of a jurisdiction which does not exist, either on the part of the learned Judge or of the town clerk.

Browning, in person, contra. Notwithstanding the erasure of the name, improperly ordered by the Court of Revision, the name still appeared on the roll for the purposes of 39 Vic. ch. 11, and it was the duty of the town clerk to have made a correct copy of the roll, including that name, for the purposes of the voters' list, and not having done so, the County Judge ought to have compelled him to do so, no matter when the application was made, and this Court has power to compel the Judge and clerk to do so by mandamus. He referred to 39 Vic. ch. 11, sec. 1, sub-sec. 4, sec. 5, sec. 6, sec. 11, sub-secs. 1, 2, 3, and 37 Vic. ch. 3, sec. 3.

March 15, 1878. HARRISON, C. J.—The voters' list is the creature of the Legislature. To the Acts of the Legislature, therefore, we must look to ascertain, not only the right of a person claiming to have his name inscribed therein, but for the mode of insertion, and as to the means, if any, provided for the correction and alteration of the list.

If any officer upon whom a duty is cast by any of these Acts refuse to perform his duty to the detriment of one of the public, who has no other specific legal remedy, the Court may, after demand and refusal, exercise its jurisdiction of granting the writ of mandamus to enforce the performance of such duty.

Duty, and the refusal to perform it, are essential to the success of an application for a writ of mandamus in such a case.

Unless the duty be clear, and the refusal reasonably clear, the prerogative writ ought not to be issued.

The Legislature of Ontario on 24th March, 1874, passed an Act for the extension of the Elective Franchise, (37 Vic. ch. 3).

It, by sec. 1, declared that "In addition to the persons hitherto entitled to vote at elections of the Legislative Assembly or Municipal Councils, the right of voting shall hereafter belong to every male person residing at the time of the election in the local municipality in which he tenders his vote; having resided therein continuously since the completion of the last revised assessment roll of the municipality; and possessing the qualifications and performing the conditions required by the laws heretofore in force, and not subject by the said laws to any disqualification, except as to property. Provided, that he derives an income from some trade, calling, office or profession, of not less than four hundred dollars annually, and is assessed for such income, in and by the last revised assessment roll of the municipality."

It is admitted that the name of the applicant was regularly placed on the assessment roll, in respect of income, for the town of Dundas for the year 1877; but his complaint is, that the Court of Revision, without notice to him, illegally erased his name from the roll, and that the town clerk in afterwards making out the voters' list omitted his name from the list; and the argument is, that notwithstanding the erasure of his name from the assessment roll, it was the duty of the town clerk to have inserted it, and of the County Judge at any time to have commanded its insertion.

Whether this duty exists or not must depend upon the legislative provisions, if any, governing the town clerk in the preparation or amendment of the voters' list.

The Act in force at the time when it is said it was the duty of the clerk to have inscribed the name on the roll, was 39 Vic. ch. 11, O., intituled "An Act to consolidate and amend the law respecting voters' lists."

The duty of the clerk under sec. 1, sub-sec. 1 of that Act is, "to make a correct alphabetical list of all persons *appearing* by the assessment roll to be entitled to vote in the municipality, prefixing to each person his number upon the roll," and this is to be done "immediately after the

final revision and correction of the assessment rolls in every year."

The duty of the clerk is not the absolute one, as in 32 Vic. ch. 21, sec. 7, O., and 37 Vic. ch. 3, sec. 3, O., to insert in the list the names of all persons entitled to vote, but only the names of all such persons whose names *appear* by the assessment roll to be entitled to vote.

If from any cause the name of a person, although once on the assessment roll, has been removed by the Court of Revision, it would be difficult to decide that such name, notwithstanding the removal, is still a name "appearing" on the roll. It may be a name which "ought to appear" on the roll, but unless a name actually "appears" on the roll, it is certainly not the duty of the clerk, in the first instance, to insert it in the voters' list.

The duty of the clerk is not judicial, but clerical or ministerial. If it were otherwise, this incongruity would arise, that the clerk, whose duty it is to copy the names appearing on the roll, might constitute himself a Court of Appeal from the decisions of the Court of Revision, of which Court he is simply a subordinate officer.

The person having the right to vote, whose name has been wrongfully removed from the assessment roll, and so from the voters' list when first prepared by the clerk, is not, however, without remedy.

The Act provides for the printing of at least 200 copies of the list, one copy whereof shall be posted up and kept posted up in the clerk's office, and for the distribution of the remainder among public officers and others described in the Act, (sec. 2).

This duty must be performed by the clerk "within thirty days after the final revision and correction of the assessment roll," (sec. 2, sub-sec. 1).

Among the persons to whom copies are required to be sent, are the sheriff, the clerk of the peace, postmasters, and public or separate school head masters or mistresses.

Each of these persons is also required, upon receipt of his or her copies, "to cause one of them to be posted up in

a conspicuous place," described in the section, (sec. 2, sub-secs. 2, 3, 4).

And this is not all, for it is made the duty of the clerk, forthwith, to cause to be inserted in some newspaper published in the municipality, or in case no newspaper is published in the municipality then in some newspaper published next thereto, or in the county town, a notice signed by him, which shall state that he has delivered or transmitted the copies of the said list as directed by the Act, and mention that of the first posting up in his own office, (sec. 3, as amended by 40 Vic. ch. 10, sec. 2).

By this notice "Electors are called upon to examine the said list, and if any omissions or other errors are found therein, to take immediate proceedings to have the said errors corrected according to law": Schedule 1, Form 2.

All this publicity is made necessary in order, among other things, that if there be any person qualified to vote, who sufficiently values his vote to examine one of the copies of the list to see whether or not his name is on it, he may do so, and finding it omitted may apply, as in the Act directed, to have his name inserted.

Such a person may, "within thirty days after the clerk has posted up the list in his office, give to the clerk of the municipality, or leave for him at his residence or place of business, notice in writing of his complaint and intention to apply to the Judge in respect thereof:" (39 Vic. ch. 11, sec. 5, as amended by 40 Vic. ch. 10, sec. 1).

The proceedings thereafter by the clerk, Judge, and parties respectively, and the powers and duties of the Judge, clerk, and other persons are the same, or as nearly as may be the same, as in the case of an appeal from the Court of Revision: (sec. 5, sub-sec. 1).

In case the clerk of any municipality fail to perform "any of the duties aforesaid," the clerk of the peace must apply summarily to the County Judge or acting Judge of the County Court for the county within which the municipality is situate, to enforce the performance of the same: (sec. 11, sub-sec. 1).

This application, which is an application against the clerk for failure to perform "any of the duties aforesaid," may be made by the person entitled to be named as an elector on the list, in respect to which the application is made: (*Ib.* sub-sec. 2).

The Judge on *such* an application, may require the clerk of the municipality, and any person he sees fit, to appear before him and produce the assessment roll and any documents relating thereto, or to the list in respect to which the application is made, and to submit to such examination on oath as may be required of him or them: (*Ib.* sub-sec. 3.)

The Judge may thereupon make such orders and give such directions as he may deem necessary or proper "for the purposes aforesaid": (*Ib.*)

In this manner and to this extent the list of voters is made "subject to revision by the County Judge," at the instance of any voter or person entitled to be a voter in the municipality for which the list is made, or in the electoral district in which the municipality is situate, on the ground of the names of voters being omitted from the list: (*Ib.* sec. 4).

In case no complaint respecting such list is received by the clerk of the municipality "within thirty days after the clerk has posted up the said list in his office," it is made the duty of the clerk forthwith to apply in person or by letter to the Judge to certify three copies of such list "as being the revised list of voters for the municipality": (sec. 6),

Immediately after the list "has been finally revised and corrected as aforesaid," it becomes the duty of the Judge to make, or cause to be made, and sign a statement in triplicate, setting forth the changes he has made in the list: (sec. 8).

The only power which the Judge has to act under this statute on complaint of a person complaining that his name has been improperly omitted from the list, and is desirous of having the same inscribed in the list, is, where such

person complains "within thirty days after the clerk has so posted up the list in his office."

If an application of the kind were permitted at any time, there would not only be an encouragement to want of vigilance, but the upsetting of the whole scheme of the Act, which is finality after certain authorized proceedings and the lapse of all time necessary for the taking of such proceedings.

This was the opinion of the learned County Judge, and it is one which has our concurrence.

The applicant, because he supposed that each person connected with the assessment roll and the voters' list had done his duty, took no concern about his name when the list was posted up and published, and so did not apply for relief within the thirty days.

He did not in fact discover the contrary of his supposition until long after the expiration of the thirty days, and then having for the first time become alive to his position and aroused as to his rights, he endeavoured to obtain that relief which it was not in the power of the County Judge then to grant.

This case is a good illustration of the maxim, *Vigilantibus non dormientibus jura subveniunt*.

The Legislature has much extended the system as to voters' lists, which formerly applied only to parliamentary elections. The lists are now to be used as well for municipal as parliamentary elections: (40 Vic. ch. 12, sec. 1, O.). While parliamentary elections do not usually take place except at intervals of several years, municipal elections are held yearly. The whole system of municipal government is made to depend on the doing of certain things within certain limited periods of time by particular officers named. If these things were permitted to be done "at any time," the municipal system would become chaos.

It is a part of the scheme as to the preparation of voters' lists, that all questions concerning their amendment, whether by additions or omissions, shall be decided by a domestic forum brought into existence for that purpose.

Rules of procedure for that Court are necessarily made a part of the scheme. The observance of these rules is essential to the success of the scheme. If occasionally injustice arise to some person negligent of his rights, it is better that he should suffer than that all persons concerned should be plunged into confusion.

The references made by the applicant to statutes in existence before 39 Vic. ch. 11, as amended by 40 Vic. ch. 12, under a different system, do not assist him in his present application.

It is quite true that by sec. 8 of 32 Vic. ch. 21, such an application as he made to the County Judge for the insertion of his name on the roll, might have been made "at any time before the issuing of the writ to hold any election for a member to serve in the Legislative Assembly," but for reasons already given this section was repealed and not re-enacted by the 39 Vic. ch. 11.

The applicant also refers to sec. 3 of 37 Vic. ch. 3, which, apparently, was not repealed by 39 Vic. ch. 11, but which must of course be read as controlled by the subsequent expression of the Legislative will.

This section reads as follows: "The clerk of the municipality, when making the alphabetical list of voters required by law, shall include the names of all male persons assessed for income of the value aforesaid."

It is not compatible with sub-sec. 1 of sec. 1 of 39 Vic. ch. 11, which makes it the duty of the clerk to make the list only of persons *appearing* by the assessment roll to be entitled to vote, and so must be held to have been super-added by the latter enactment.

The blunder of which the applicant complains is one which ought never to have been made, and is without excuse. But as he omitted to avail himself of the machinery specially created for the remedying of such a blunder, we are unable to assist him in his present application.

His application is for a writ of mandamus commanding the County Judge and town clerk to place his name on the voters' list for 1877, although he failed to make the application within the time limited for the purpose.

We are of opinion that it is not the duty of either of these officers to do as asked, and as the learned County Judge has incurred the expense of shewing cause to the rule *nisi* which the applicant obtained, we must discharge the rule, with the costs of the County Judge.

Rule discharged.

DENISON V. LESSLIE.

R. W. Co.—Action by creditor against shareholder—Proof of defendant being a shareholder—C. S. C. ch. 66.

In an action against defendant as a shareholder of ten shares for unpaid stock, it appeared that defendant signed the stock book, which was headed with an agreement by the subscribers to become holders of the stock for the amounts set opposite their respective names, and upon allotment by the company "of my, or our said respective shares," to pay the company ten per cent. of the amount of said shares, and all future calls. The company subsequently passed a resolution instructing the secretary to issue allotment certificates to each shareholder for the shares held by him. The secretary accordingly prepared such certificates, which respectively represented that the company, "in accordance with your application for — shares, have allotted to you shares amounting to," &c. These were handed to the company's broker to deliver to the shareholders and collect the ten per cent. It did not appear that the certificate was ever delivered to defendant, or that he was ever expressly notified of the allotment, but he was with the rest of the shareholders, from time to time, notified of the calls, to which he paid no attention, and had never paid anything on the stock; and some years afterwards, on being requested by the secretary to pay up his stock, he stated that he did not consider that he ought to pay anything, but gave no reason why.

Held, that there was sufficient evidence of notice to defendant of the allotment; and that it was not *ultra vires* of the directors to take defendant's subscription for stock without at the same time receiving payment of the ten per cent. thereon. The defendant was therefore held liable.

ACTION by a judgment creditor of the Toronto, Grey, and Bruce Railway Company against a shareholder of the company.

Pleas—1. That defendant was not nor is a shareholder.

2. That there is nothing due on the shares of the defendant.

3. That the plaintiff recovered judgment against the said company upon and in respect of two promissory notes made by the said company to one Frank Shanly, and by him endorsed to the said plaintiff; and that the plaintiff became and was the holder of the said notes without any value or consideration therefor, and after maturity, and he became such holder collusively and solely for the purpose of bringing this action, and the plaintiff was not the *bond fide* or beneficial holder of the said notes, and was not a creditor within the meaning of the statute in that behalf of the said company in respect of the said notes, and the company were not liable to pay the same, and the judgment against the said company was obtained by the plaintiff fraudulently and collusively with the said Shanly and the company. Issue.

The cause was tried before Hagarty, C. J., without a jury, at Toronto, at the Fall assizes of 1877.

The defendant's subscription for ten shares of \$100 each in the stock book of the company was admitted.

W. Sutherland Taylor said: I have been secretary and treasurer of the company since the beginning; we call this the stock book; I have not any list except this book; we have not a regular share register; no share register or official document prepared under the Act of Parliament. I have the ledger with the names of all the shareholders in it; that contains the addresses; that is the book from which the list I have is made out; that book shews the defendant stands indebted to the company for the full amount of his stock: there has been no payment on the defendant's stock; the other stock as a general rule has been paid; notices of meeting were by advertisement, and also notices of call; the entire stock has been called up from time to time; when we found shareholders were not responding to the advertisements by coming and paying their calls, we sent them circulars reminding them the money was due; we did this many times; I do not remember of course who they were sent to; I have not a list of those to whom circulars were sent; we intended to notify all, and I be-

lieve all were notified ; I have no special recollection of this one ; I did on one occasion ask the defendant to pay up his shares, that is five or six years ago ; to the best of my recollection, he told me he did not consider he ought to be called upon to pay anything ; I forget the exact conversation, but that was the meaning of it ; I do not think he stated any particular reason why he should not be called upon to pay ; I do not think there is any particular reference to Mr. Lesslie in any of the books of the company ; no one has ever been removed from that list but those who have transferred their stock ; I do not remember of any letters from Mr. Lesslie in reference to the stock, nor of any application to take his name off the list ; the calls were made, ten per cent. at the time of subscription, and ten per cent. at different dates ; second call 16th February, 1870 ; third call 16th May ; fourth call 16th July ; fifth call 28th September ; sixth call 26th January, 1872 ; seventh call 26th March ; eighth call 11th November ; ninth call 16th January, 1873 ; tenth call 24th March, 1873. These calls were advertised in the *Ontario Gazette*, and according to the terms of the charter ; I do not remember any notice particularly being sent to Mr. Lesslie ; the notices were generally sent out by a clerk ; this is a form of the notice ; I am not aware of any resolution of the board allotting any particular stock to Mr. Lesslie individually. There is a resolution in one of the minute books in reference to the allotment of stock ; I produce the minute book under date 1st July, 1869 ; there is an entry "Secretary instructed to issue allotment certificates to each shareholder for the amount of shares held by him." That is the only entry I can find in reference to the allotment of stock.

There was a document presented to each of the shareholders informing them the stock had been allotted to them ; the receipt for the first payment was written on the back of that ; these certificates were put into the hands of Messrs. Campbell & Cassels to hand to the shareholders, and collect the first call ; they were brokers for the company ; the receipts were signed by Campbell & Cassels

when they got the money ; Mr. Lesslie stands in the same position as the other shareholders. I always knew he did not pay his stock ; I remember of speaking to him on one occasion ; there was no reason if the shareholders received notice in the ordinary course of business why Mr. Lesslie should not receive his ; as far as I know the notices were sent to Campbell & Cassels for each shareholder. The word *application* in the certificate of allotment refers either to the stock book or to some application by people who did not sign the stock book ; I have not any of the slips of separate application with me here.

The defendant called by plaintiff said : It is so long since I cannot say what number of notices I received ; I remember receiving some such notice asking for payment ; I think the notices I got were merely notices of calls ; I paid no attention to them as I did not consider myself a stockholder, not having paid the ten per cent. : I may have got notices like the circular now in Court ; the first notice I received was, I suppose, for the ten per cent. ; I did not know but what these notices were but a repetition of that first demand ; I do not remember whether Mr. Taylor called upon me or not, he may have done so ; I knew I was down on the books as a shareholder.

Cross-examination.—I never paid anything on the stock ; I never received any notice that any particular stock was allotted to me ; I never saw or heard of such a certificate as that ; I never received any certificate of apportionment of stock as mentioned in the Statute ; I asked Mr. Gordon, the President of the Railway, to have my name erased from the books, as I did not consider myself a stockholder, and having no connection with the concern beyond subscribing the book ; I never signed in any other book ; I never acted as a shareholder ; I never attended a meeting or voted at all.

Re-examined.—I cannot say when the interview with Mr. Gordon took place. I suppose it was two years ago ; I think I could remember if a clerk had come round with a certificate like that in Court in his hand asking me

for a payment. I have no recollection of being asked for the ten per cent.

The heading of the stock list was as follows:

“ We the several persons, firms, and corporations, whose names and seals are hereunto subscribed, severally and respectively agree to and with the Toronto, Grey, and Bruce Railway Company, and bind ourselves, our executors, administrators or successors, respectively, to become holders of the capital stock of the Toronto, Grey, and Bruce Railway Company, for the number of shares of (one hundred dollars each) and amounts set opposite to our respective names, and upon the allotment of the said company of my, or our said respective shares, we severally and respectively agree to pay to the said company ten per centum of the amount of the said shares respectively, and to pay all future calls that may be made on the said shares respectively, provided always that no call shall be made until sixty days shall have elapsed from the time that a previous call was made payable, and no call shall exceed ten per centum of the amount subscribed.

"Toronto, April, 1869."

The following is a copy of the certificate which was granted to the stockholders on the payment of the first ten per cent.

"Toronto, 1st July, 1869.

“To (For the name of the shareholder.)

“This is to certify, that the Toronto, Grey, and Bruce Railway Company, in accordance with your application for shares of \$100 each of the capital stock, have allotted to you shares, amounting to \$, the first instalment of ten per cent. thereon being payable forthwith, and all future calls to be made at a rate not exceeding ten per cent. on the amount of said shares, and at intervals of not less than sixty days.”

(Signed) "W. SUTHERLAND TAYLOR,
Secretary."

And on the back was a receipt for the first instalment, which the brokers, Campbell & Cassels, would sign.

The form of notice of call put in was in the usual form, "that a further call of ten per cent. on the capital stock of the Toronto, Grey, and Bruce Railway Company falls due on the inst., and that the same is payable at the offices of the company;" and that the person addressed "will oblige by at once sending a cheque for the amount of the call due on the stock held by you."

On that evidence a verdict was entered for the plaintiff for \$1,000.

In Michaelmas Term, November 23, 1877, *W. Macdonald* obtained a rule, calling upon the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered, or a verdict for the defendant on the first plea, pursuant to the Lord Reform Act, and to leave reserved, upon the following grounds:—That no contract was proved ever to have existed between the defendant and the railway company by virtue of which the defendant ever became a shareholder in the company. That if it be held that such a contract was shewn, the terms of such contract were *ultra vires* of the directors, and were therefore not binding on the defendant for the want of mutuality. That by the terms of the Act of incorporation of the said company ten per cent. of the amount of stock subscribed for was required forthwith upon subscription; and until such payment was made no one could become a shareholder in the said company, and no such payment was shewn to have been made by the defendant.

In this term, February 8, 1878, *T. S. Kennedy* shewed cause. The Act of Incorporation of the company, 31 Vic. ch. 40, O., has embodied many of the provisions of The General Railway Act, Consol. Stat. C. ch. 66, and among them, the clauses relating to shareholders. And by sec. 7. sub-sec. 19, of that Act, "The word *shareholder* shall mean every subscriber to or holder of stock in the undertaking, &c." The defendant admitted he subscribed for the ten shares, and he admitted he had been frequently notified by the company to pay the calls made on his

stock. He said shares had never been allotted to him, nor had he ever accepted any assignment or allotment of any shares, nor had he paid anything upon them, nor had he attended at any meeting of the company or voted upon its affairs. But acceptance of shares may be implied from acts and conduct, as well as by a formal allotment and the adoption of such allotment: *Re International Contract Co., Levita's Case*, L. R. 3 Ch. 36; *In re National Savings Bank Association, Hebb's Case*, L. R. 4 Eq. 9; *In re Universal Banking Corporation, Gunn's Case*, L. R. 3 Ch. 40; *Lake Superior Navigation Co. v. Morrison*, 22 C. P. 217; *Davidson v. Grange*, 4 Grant 377, 380. Section 27 of the Act required that on the subscription for shares the subscriber "shall pay forthwith to the directors, for the purposes set out in this Act, ten per cent. of the amount subscribed by him, and the directors shall deposit the same in some chartered bank to the credit of the company." But the subscription of stock was not avoided because the ten per cent. was not forthwith paid. Sections 15 and 17 recognize stockholders who have not paid the first ten per cent.: *Port Dover and Lake Huron R. W. Co. v. Grey*, 36 U. C. R. 425; *Bullivant v. Manning*, 41 U. C. R. 517. The plaintiff claims to be allowed interest against the defendant upon the stock from the time the calls were respectively made.

Macdonald, contra. It was beyond the power of the company to take the defendant's subscription for stock without his making at the same time payment of ten per cent. upon it according to the statute: *Brice on Ultra Vires*, 2nd ed., 338; *In re National Savings Bank Association, Hebb's Case*, L. R. 4 Eq. 9; *In re Richmond Hill Hotel Co., Pellatt's Case*, L. R. 2 Ch. 527, 735; *In re Universal Banking Corporation, Gunn's Case*, L. R. 3 Ch. 40, 41, 43; *In re Universal Non-Tariff Fire Ins. Co., Ritso's Case*, L. R. 4 Ch. D. 774, 782. There never was a contract therefore between the company and the defendant by which the defendant ever became a shareholder for any amount of stock in the capital of the company. There was an agreement or proposition by him to take stock, but the company was

not bound to give it to him. They never assigned or allotted to him any certain amount of shares, or any stock whatever, and of course there was and could be no notice to him of such an assignment or allotment. He never accepted any stock or shares. The offer to take shares was not an acceptance of them. There could be no acceptance till the company had set them apart for him. The notices of call sent to him amounted to nothing; he still did not know what shares the company were making calls upon; he never ratified by his subsequent acts or conduct the proceedings of the company treating him as a shareholder; he attended no meetings; he never voted; he did nothing of any kind adopting or recognizing his being a shareholder. He was not bound to take any notice of the calls made upon him. In the only conversation he had with the officers of the company he denied being a shareholder, and he requested his name to be removed from the share list. He referred to *Brice on Ultra Vires*, 2nd ed., 345, 648, 652; *McIntyre v. McCracken*, 37 U. C. R. 422; *In re Universal Banking Co., Harrison's Case*, L. R. 3 Ch. 633, 635, 638; *In re Leeds' Banking Co., Ad-dinell's Case*, L. R. 1 Eq. 225; *In re Rolling Stock Company of Ireland, Shackleford's Case*, L. R. 1 Ch. 567; *In re Essex Brewery Company, Barnett's Case*, L. R. 18 Eq. 507; *Union Turnpike Co. v. Jenkins*, 1 Caine, N. Y. 381, 386; *Wood v. Coosa & C. R. R. Co.*, 32 Georgia 274, 285; *Wight v. Shelby R. W. Co.*, 16 Monroe, Ken. 5; *Erie & W. R. R. Co. v. Brown*, 1 Casey 156; *Garrett v. D. & M. R. R. Co.*, 78 Penn. 465; *Moore v. Murphy*, 11 C. P. 444.

March 15, 1878. WILSON, J.—The defendant it is said is a shareholder within the meaning of the Consol. Stat. C. ch. 66, sec. 7, sub-sec. 19, because he was and is “a subscriber to or holder of stock in the undertaking.”

The question is, is he a subscriber to or holder of stock in the undertaking?

It is contended he did not “subscribe to stock,” and that

he was not at any time the holder of stock, but that he was only a subscriber *asking for stock to be given or allotted to him*, and that the stock he asked for was never given or allotted to him.

The like definition is given of the word in the Rev. Stat. O., 1311, 1321, 1492.

The defendant subscribed the stock book and agreed to become a holder of the stock for ten shares, "and upon the allotment of the said Company of my or our said respective shares," he agreed to pay to the Company ten per cent. of the amount of the said shares and to pay all future calls.

The defendant was not according to these terms the holder of the ten shares by the mere act of subscription. The Company had the right to allot to him any of the said shares, and if they did, then he agreed to pay ten per cent. at once and the future calls which might be made on him. The Company did after that profess to do something towards an allotment of shares. They passed a resolution on the 1st July, 1869, that "the Secretary was instructed to issue allotment certificates to each shareholder for the amount of shares held by him." The Secretary then said that a document was "presented to each shareholder." He can only mean, I think, from what follows, that it was *prepared for* each shareholder, informing him that the stock had been allotted to him, and "these certificates were placed in the hands of Messrs. Campbell & Cassels to hand to the shareholders and collect the first call. They were brokers for the Company." The receipt on the back of each certificate for the first instalment was to be signed by Campbell & Cassells when they got the money.

There is no evidence that the defendant got such a certificate. It is quite certain, however, he never paid anything upon the stock.

The certificate represented that the Company "in accordance with your application for——shares have allotted to you——shares amounting to \$——."

There is no special mode of allotting shares pointed out in the statute or in the agreement heading the application for stock which the defendant subscribed.

The Company passed the resolution that allotment certificates be issued to each shareholder for the amount of shares held by him. There does not seem to have been any other actual or any more formal allotment made of the shares than the resolution of the directors to issue the certificate, and the issuing of it for each *subscriber* for the amount of shares subscribed or applied for by him, treating such subscription as constituting him a "shareholder for the number of shares held by him," according to the language of the resolution.

It is not likely that there were so many subscribers that the directors had to pick and choose which of them they should take. It is more likely they accepted every subscriber as a shareholder for the shares for which he had applied, and issued a certificate to their brokers accordingly.

What became of the defendant's certificate does not appear.

The evidence shews the defendant was, with the general body of stockholders, soon after the subscription notified of every call which was made upon the stock he had subscribed for, and that he paid no attention to them—that is, he paid no money upon them. About five or six years ago, when spoken to by the secretary of the Company "to pay up his shares," he said he did not consider he ought to be called upon to pay anything. He did not give any particular reason why he should not pay. The defendant himself said, "I did not consider myself a stockholder, not having paid the ten per cent."

The facts then generally appear to be, that the defendant subscribed or applied for ten shares on the 2nd of June, 1869: that a resolution was passed by the directors for the secretary to issue certificates of allotment for shares "in accordance with the defendant's application for shares," and that such certificates were given to their brokers to collect the first instalment upon the stock; but the resolution or certificate was never formally notified to the defendant of the shares being allotted to him. The first call was made sometime in that year. In February, 1870, the second call was made. Three other calls were made in the same year, and the others were made at later periods.

The defendant got these notices; did nothing about them; and he considered he was not a stockholder because he did not pay the first instalment, and because he said he ought not to be called upon to pay.

Do these facts shew the defendant became a shareholder of ten shares in the stock of the Company?

In *Moore v. Murphy*, 11 C. P. 444, the defendant not only subscribed but paid a part of his stock, and so was plainly a shareholder.

In *Lake Superior Navigation Co. v. Morrison*, 22 C. P. 217, the contract the defendant signed for stock was simply, we whose names are hereunto subscribed hereby agree to take the number of shares set opposite our respective names, &c.—nothing said of allotment; and the defendant attended meetings of the Company, and was elected and acted as a director. No doubt, then, he was a shareholder.

In *Port Dover and Lake Huron R. W. Co. v. Grey*, 36 U. C. R. 425, the defendant had subscribed for and paid part of his stock, and was therefore a stockholder.

In *Re Rolling Stock Company of Ireland, Shackelford's Case*, L. R. 1 Ch. 567, the party sent an application requesting the directors to allot him 2,000 shares, all future calls to be paid "in rolling stock, as arranged." The directors did not answer, but put his name on the register of shareholders for the 2,000 shares. He never received notices, nor was he treated as a shareholder. *Held*, affirming the decision of Wood, V. C., that there was no concluded contract by the applicant to take shares, and that he was not a contributory.

It was decided in *The New Theatre Co., Bloxam's Case*, 33 Beav. 529, that if one apply for shares, and they are allotted to him, the application and allotment constitute a complete contract, and it is not necessary the fact of allotment should be communicated to the applicant.

See also, per Wood, V. C., in L. R. 1 Ch. 570, note (1). But that decision has not been followed or approved of.

In the case *In Re Richmond Hill Hotel Co., Pellatt's Case*, L. R. 2 Ch. 527, 530, 535, Lord Justice Cairns said, "Where an individual applies for shares in a company,

there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract. * * * I cannot, therefore, consider an application for shares, followed by a registration not communicated to Mr. Pellatt, to constitute a completed transaction."

In *Re National Savings Bank Association, Hebb's Case*, L. R. 4 Eq. 9, Hebb applied in writing for ten shares, and the directors allotted them to him. After the allotment, but before it was communicated to him, he withdrew his application. *Held*, he had not accepted the shares.

In *Re Universal Banking Corporation, Gunn's Case*, L. R. 3 Ch. 40, where a person applies for shares and they are allotted to him, he will not be constituted a member unless he has notice of the allotment. It is not required there should be a formal notice sent to him, if it appear he was made aware that the Company had accepted his application. The mere entry of his name on the register of shareholders is not sufficient for this purpose.

As was said by Rolt, L. J., in that case, p. 45: "In deciding *Levita's Case*, L. R. 3 Ch. 36, I did not take Lord Cairns, in *Pellatt's Case*, to have meant that there must be a response in writing, but that what he meant was this—there must be, in writing, or verbally, or by conduct, something to shew the applicant that there was a response by the Company to his offer. There was enough to satisfy me that Levita knew that the Company had assented to his request, and had treated him as a shareholder accordingly, and had placed him on the register."

In *Re International Contract Company, Levita's Case*, L. R. 3 Ch. 36, application was made for shares. No letter of allotment was sent to the applicant. His name was advertised as a director. He attended as a director, and received a fee for it. He remained for about two years without applying to have his name removed. *Held*, he was a contributory.

The question then is, whether the Company made any response to the application of the defendant for the ten shares of stock he subscribed for and agreed to take?

Was there anything in writing to that effect, or verbally or by conduct something to shew the applicant that there was a response by the Company to his offer ?

I think there is evidence that the secretary of the Company, under the resolution of the directors of the 1st of July, 1869, within four weeks after the defendant's subscription, did issue the certificate of allotment for the defendant's ten shares subscribed for to their brokers, Campbell & Cassells. There is no evidence that such certificate or any express written notice of allotment was ever given to the defendant. But he was called upon by notices repeatedly for calls upon his stock, which he did not regard, nor repudiate. The secretary spoke to him about paying up his stock. He only said he did not think he should be called upon to pay it, but gave no reason why. He did not say he had got no notice of allotment, or that he did not know he was a shareholder, or that the Company had never treated him as such ; and he knew all along that he had given the Company the power to make him a shareholder. Yet he never, until about seven years after his subscription, and long after the different notices had been served upon him calling for payment of his stock, desired his name to be removed from the stock list. And he also said the reason he did not think he was a shareholder was because he had not paid the first instalment upon his stock.

Upon these facts, I think there is evidence that the Company did make a response to the application of the defendant for stock, by the acceptance of it for the ten shares, and that he knew of it soon after the making of his subscription, and did not repudiate it while it was still open to him to do it.

I do not think it was *ultra vires* of the directors to take the subscription of the defendant for stock without receiving from him at the time of subscription the ten per cent. upon such stock.

I do not think that people should heedlessly subscribe for stock, and allow themselves to be treated as stockholders, and delude the creditors of the Company by a roll

of genuine responsible names, when all they represent is said to be a sham.

It is better to hold such persons to the strict letter of their bargain, so that they lose, if at all, only by the contract they have made, than the creditors should, after they have trusted to the stock list, be deceived by a bead roll of names which it is said means nothing.

In my opinion the verdict should stand for the plaintiff, but I am not disposed to add the interest to the principal stock.

The rule should be discharged.

HARRISON, C. J., and ARMOUR, J., concurred.

Rule discharged.

BOYD V. THE PUBLIC SCHOOL BOARD OF THE VILLAGE OF BOBCAYGEON IN THE COUNTY OF VICTORIA.

Union school sections—40 Vic. c. 16, s. 11, sub-sec. 4 O. ; 37 Vic. c. 28, sec. 74. O.

On the 1st November, 1874, a Union School Section was formed by adding to section 6 in the township of Verulam several lots in the township of Harvey. The village of B., which became incorporated on the 1st January, 1877, was all in Verulam, and before such alteration formed part of said section 6. In 1874, before the alteration, section 6 had raised by-law \$5000 to build a school house, and in 1876 the plaintiff was assessed by the Union section so formed in respect of the lots thus added, part of his assessment being for said loan.

Held, that the Union section existed in fact on the 2nd March, 1877, when the 40 Vic. ch. 16, sec. 11, sub-sec. 4, O., was passed: that its existence was not altered by the incorporation of the village: that under that statute, though illegally formed, it must be decreed to have been legally formed; and that the rate therefore was legal.

THIS was an action by the plaintiff against the defendants to recover back certain moneys paid by him under protest for alleged school rates.

The first count was for money paid, money received, &c., by the defendants to the use of the plaintiff.

The second count was for money payable by the public school trustees of section number six in the township of Verulam in the county of Victoria, styling themselves trustees of union school section number six Verulam and Harvey, for money lent, money paid, money received, &c., by said trustees, alleging that the defendants were the successors in office of the said trustees.

Pleas: To the whole declaration: never indebted; and payment.

To the second count: never indebted, and payment as the said public school trustees of section number six, Verulam and Harvey.

Issue:

The cause was tried before Hagarty, C. J., without a jury, at Lindsay, at the Fall Assizes of 1877.

At the trial the following notice was proved:—

“PUBLIC SCHOOL ACT OF 1874.

“A meeting of the reeves of Harvey and Verulam, and the public school inspectors of Peterborough and East Victoria, was held at the town hall, Bobcaygeon, on Monday, November 1st, at 2 o'clock p.m., for the purpose of altering the boundaries of union school section No. 1, in the township of Harvey and Verulam, by uniting a part of said school section to school section No. 6, in the township of Verulam.”

(Signed)

“J. H. KNIGHT,

“P. S. Inspector.”

“Lindsay, 16th October, 1875.”

In pursuance of that notice the meeting therein referred to was held, and thereat a resolution was passed, that lots 10, 11, 12, 13, 14, and that part of lot 15 lying south of the river, in the nineteenth concession of Harvey, should be attached to school section number six of Verulam, for school purposes.

It appeared that the township of Verulam was in the county of Victoria, and the township of Harvey in the county of Peterborough, and the village of Bobcaygeon,

which became incorporated on the first of January, 1877, was in Verulam, and was all in school section number six, as it existed prior to the passing of the said resolution.

The alteration made by that resolution took effect on the 25th December, 1875, and the union school section thus created thereafter existed in fact.

Prior to such alteration, and some time in the year 1874, school section number six of Verulam raised by way of loan the sum of \$5,000, to build a school house in that section.

The plaintiff was assessed in 1876, in respect of the lots 12, 13, 14 and 15 attached by the resolution referred to to school section six of Verulam, and the taxes charged against him in respect of such assessment for the school purposes of the union school section six so formed amounted to \$201.58, part of which, \$95, was to meet the interest and sinking fund of the loan above mentioned.

This sum of \$201.58 was paid by the plaintiff under protest, and threat of distress to one Buck, the collector, on December 27th, 1876, and was by the collector paid over to the treasurer of the union school, section six; and the present defendants, the village of Bobcaygeon having in the meantime been incorporated, succeeded the trustees of union school section six; and this action was brought to recover back the sum so paid, on the ground that the said lots in Harvey were illegally attached to school section six of Verulam, and the union thereby formed was illegal; and at all events to recover back the \$95 as having been improperly charged against him in respect of his said lands in Harvey.

The learned Chief Justice entered a verdict for the plaintiff for \$201.58, subject to the opinion of the Court.

In Michaelmas term, November 23, 1877, *W. Redford Mulock* obtained a rule *nisi* to set aside the verdict entered for the plaintiff, and to enter a nonsuit or verdict for the defendants, on the following, amongst other grounds: 1. That the plaintiff did not prove that the defendants had

received the moneys sued for. 2. That the defendants are not liable for the plaintiff's claim. 3. That the defendants are not liable for money collected illegally by Buck. 4. That the public school trustees of section number six, Verulam and Harvey, were not a corporation duly formed and liable to the plaintiff in respect of the matters sued on.

In this term, February 9, 1878, *M. C. Cameron*, Q. C. and *J. B. Dixon*, shewed cause.

J. K. Kerr, Q. C., contra.

The following authorities were referred to: *Askew v. Manning*, 38 U. C. R. 245; *Re Petition of Minister of Education*, 28 C. P. 325; *Dwarris on Statutes*, 2nd. ed., 632, 633.

March 15, 1878. ARMOUR, J.—The cases of *Halpin v. Calder*, 26 C. P. 501, and of *Askew v. Manning*, 38 U. C. R. 345, established that unions formed as in the case before us were without authority of law, and for remedy the Act 40 Vic. ch. 16, sec. 11, sub-sec. 4, was passed, which provides that "All existing school sections, and all unions of school sections comprised of parts of the same or different municipalities which now exist in fact, and whether formed in accordance with the provisions of the law in that behalf or not, are to be deemed as having been legally formed, and such unions shall hereafter continue to exist, subject, however, to the provisions of this Act, as if they had been formed thereunder."

This Act was passed on the 2nd of March, 1877, and if the union school section six, as formed by the resolution above referred to, existed in fact on that day, then it is to be deemed as having been legally formed.

It may be that if it is to be so deemed as having been legally formed, many parts of the school law, from the fact that it comprises parts of different counties, may be inapplicable to it; but that does not, in my opinion, prevent its being so deemed under the wide words of this remedial Act.

I am of the opinion that it did so exist in fact on the 2nd day of March, 1877, within the meaning of the said Act, and was legalized thereby, and that the fact of the village of Bobcaygeon having become incorporated before the passing of the Act did not alter its existence in fact, because by 37 Vic. ch. 28, sec. 74, it is provided that "The school boundaries of a village rural school section, or other school division, existing at the time of its incorporation, as a village or town municipality, shall continue in force, and be considered as the school boundaries of the newly incorporated village or town, notwithstanding its incorporation, until such boundaries are altered under the authority of this Act."

As to the plaintiff's claim to recover back the \$95, I see nothing in the school law by which he can claim to be exempt from the payment of this amount.

In my opinion, this rule should be absolute to enter a verdict for the defendants. I refer to *Re Petition of Minister of Education*, 28 C. P. 325.

HARRISON, C. J., and WILSON, J., concurred.

Rule absolute, (a).

OSLER V. BOWELL, ET AL.

Joint Stock Gas Company, under C. S. C. ch. 63,—Powers—Liability of shareholders to creditors,—Liability of trustees.

In 1872 five persons filed in the Registry office a declaration that they were desirous of forming a joint stock company, under Consol. Stat. C. ch. 63, by the name of the Dominion Safety Gas Company, for the object of "the manufacture and (or) sale of the machinery and materials for the manufacture or production of gas from evaporating fluids, and gas fixtures of all kinds, and such other articles as may from time to time be deemed advisable; and also the lighting of cities, towns, villages, steets, capital buildings, steamboats, coaches, and street and railroad cars with gas," with a capital stock of \$6000, in 300 shares of \$20 each, and three of the defendants were stated to be trustees. Subsequently these trustees met and passed by-laws as to the government of the company. On 17th February, 1873, a meeting of the shareholders was held, when an agreement was entered into for the purchase of a patent for the manufacture of gas, and a resolution was passed that the shareholders should pay on their stock enough to make a working capital of \$1250. An agreement was made that the stock should be divided up between the five defendants in proportions stated, and these defendants, as shareholders, subsequently met, increased the number of trustees from three to five, and elected themselves such trustees. No stock was ever subscribed for or anything ever paid thereon, the money required to carry on the business being raised from time to time by contribution. The company, in 1874, put up a gas machine in the plaintiff's residence, which, on 12th February, 1874, exploded, and injured the plaintiff, for which he sued the company and recovered damages, and on 29th February, 1876, judgment was entered, and a *fi. fa.* goods issued against the company, which was returned *nulla bona*. This action was then brought against defendants, as shareholders for the amount of the unpaid stock, and also as trustees on their individual liability under the Act for neglecting to publish within twenty days after the 1st January, 1875, as required by the Act, a report stating the amount of the capital stock actually paid and of the then existing debts of the company, or to insert therein plaintiff's claim as one of such existing debts.

Held, that the company was duly incorporated under Consol. Stat. C. ch. 63, for though the Act did not authorize the formation of a company for lighting cities, &c. with gas, it did for the other objects stated, and the corporation could exist for such objects alone.

Held, also, that the evidence set out below was sufficient to shew such incorporation.

Held, also, that defendants were not liable as shareholders in the company, to the plaintiff, as a creditor; for to create such liability, under the statute, there must be a subscription for stock; and the fact that they had acted and been treated as shareholders would not enable a creditor to proceed against them as such.

Held, also, that neither were they liable as trustees for neglecting to make the report, for the plaintiff's claim was not an existing debt at the time of such neglect, nor until the entry of his judgment.

THE first count of the declaration alleged that, on the 29th of February, 1876, the plaintiff recovered a judgment

for \$8,300.00 damages, and \$313.97 costs, against the Dominion Safety Gas Company, and on the same day issued an execution against the said company, directed to the sheriff of the County of Hastings, which execution was returned unsatisfied. The plaintiff then averred that the Dominion Safety Gas Company is a manufacturing company, duly incorporated under ch. 63 Consol. Stat. C., carrying on their operations in the Town of Belleville, and having a capital stock of \$6,000, in 300 shares of \$20 each: that the company was continued a joint stock company under the said Act from the 23rd of September, 1872, until after the commencement of this suit: that the judgment was not recovered for or in respect of a debt contracted by the company with the plaintiff which was not to be paid within one year from the contracting thereof: that the action in which the judgment was recovered was commenced against the company within one year after the debt became due, and the defendants, before the debt was contracted, and before this action, subscribed for and became and were, and each of them was, at the commencement of this suit, stockholders of and in the said company, and that the whole amount of the capital stock had not been paid in, nor had a certificate to that effect been registered, nor had the defendants paid up the full amount of their shares, nor any sum on account thereof, nor registered a certificate of payment of the whole amount of the capital stock of the company; by means whereof, and by force of the statute in that behalf, an action hath accrued to the plaintiff to demand from the defendants, as such stockholders, the amount of the judgment recovered against the company.

The second count, after alleging the recovery of the judgment, and issue and return of execution, and the incorporation of the Dominion Safety Gas Company, as in the first count alleged, averred that the judgment was recovered in respect of a debt existing on the 14th of February, 1874: that the company did not, within twenty days from the 1st of January, 1875, make a report stating

the amount of the capital stock of the company and the proportion thereof then actually paid in, together with the amount of the existing debts of the company, signed by the chairman or president and a majority of the trustees of the company, and verified by the oath of the chairman or president, or of the secretary, of the company; nor did the company cause the same to be inserted in some newspaper published nearest the place where the business of the company was carried on; nor did the company cause the same to be entered and registered in the registry office &c.; nor was any such report made, published or registered as aforesaid; nor even if such report were made, did it state therein the demand of the plaintiff as being one of the debts of the company: that the defendants were, on the 13th of February, 1874, and have since continued to be, trustees of the company duly elected, nominated, and appointed, and acting as such; by means whereof, and by force of the statute, an action had accrued to the plaintiff to demand from the defendants the amount of the said judgment.

The defendants pleaded several pleas.

1. To the whole declaration: never indebted.
2. Traverse of the incorporation of the company.
3. That the judgment in the first and second counts alleged was recovered in an action by the plaintiff for injuries caused and done to the plaintiff by reason of the explosion of a gas machine furnished by the company to the plaintiff, and not for or on account of any debt existing or contracted by the company.
4. To the first count: never indebted.
5. To the second count: denial that defendants, or any of them, were trustees of the company.
6. To the first count: that there were numerous stockholders of the company resident and being within the jurisdiction of the Court, in addition to the defendants, and that the whole amount of the capital stock was paid in at the time of the incorporation, and so stated in the declaration of incorporation, and registered, and a certificate to that effect was duly made and registered; and that the defendants.

duly paid the whole amount of the stock subscribed by them before the recovery of the judgment.

7. To the second count: that the judgment was not recovered in respect of a debt existing on the 14th of February, 1875.

8. To the second count: that the company did make and publish the said report according to the provisions of the statute.

9. To the second count: that there have been and are trustees of the company five trustees duly elected, and that the said trustees, in addition to the defendants, were and are within the jurisdiction of the Court.

10. To the whole declaration: that the Dominion Gas Company, prior to the recovery of the judgment, never was indebted to the plaintiff.

The plaintiff joined issue on the several pleas of the defendants.

The cause was tried at the Hamilton Spring Assizes for 1876, before his Honor Judge Sinclair, the County Judge, sitting for Wilson, J., without a jury.

On 7th September, 1872, Messrs. William Roger Dean, of the town of Belleville; Mackenzie Bowell, of the same place; William Cole Nunn, of the same place; Samuel Shaw Lazier, of the same place, and Oliver Cromwell Gibbs, of the city of Boston, filed in the register office of the county of Hastings, pursuant to the statute Consol. Stat. C., ch. 63, a statement or declaration to the effect that they were desirous of forming a joint stock company under and by virtue of ch. 63 of the Consolidated Statutes of Canada.

The statement contained the following particulars: 1. "The corporate name" of the company, "which is 'The Dominion Safety Gas Company.'" 2. The object for which the same formed, being the manufacture and (or) sale of the machinery and material for the manufacture or production of gas from evaporating fluids, and gas fixtures of all kinds, and such other articles as may be from time to time deemed advisable, and also the lighting of cities, towns, villages, streets, capital buildings, steamboats, coaches, and street and railroad cars with gas. 3. The stock of the company,

being \$6,000. 4. The shares, three hundred shares of \$20 each. 5. All of which is now paid in. 6. The number of trustees who are to manage the concerns of the company for the first year is three, and their names are, William Roger Dean, Mackenzie Bowell, and Samual Shaw Lazier, above named. 7. The manufacturing operations of the company to be carried on in, and adjacent to, the town of Belleville, and the other operations of the company to be carried on throughout the Dominion of Canada; and 8. The term of the company's proposed existence, fifty years."

This statement was acknowledged before the county registrar, who gave a certificate thereof under the statute.

The trustees of the company met on 13th September, 1872, when a number of by-laws were adopted for the government of the company and its officers, including the president, secretary, and treasurer.

On 17th February 1873, there was a meeting of the shareholders of the company, when Mr. Nunn produced a patent for the manufacture of gas, which he agreed to assign to the company, and the company to accept, and a resolution was carried to the effect that the stockholders be required to pay in proportion to their stock, enough "to make a working capital of \$1,250."

It was agreed that two-fifths of the capital stock should be divided among Lazier and Dickson, and three-fifths among Bowell, Nunn, and Gibbs.

The only money paid into the funds of the company were by Dean, Lazier, and Dickson. They paid about \$200 each. The original promoters of the company were Nunn, Gibbs, and Bowell. They spent about \$600 in the aggregate in promoting the enterprise. This included the purchase money of the patent.

When Dean, Lazier, and Dickson became members of the company they paid \$600 to the promoters, and received an assignment of two-fifths interest in the patent, and became stockholders in the company to the extent of two-fifths.

The company commenced business in 1873 without any cash on hand. Moneys needed for carrying on the business of the company were raised by contribution among the

stockholders. Mr. Bowell paid on one occasion between \$200 and \$300 for this purpose. Others contributed in the same manner. None of them paid in money his proportion of the capital stock of the company.

At a meeting of the shareholders, held on the 8th of December, 1873, the number of trustees was increased from three to five, and on the same day Messrs. Bowell, Dean, Dickson, Nunn, and Lazier, as shareholders, elected themselves to be trustees.

At a meeting held on the following day Mr. Bowell was elected president, Mr. Dean treasurer, and Mr. Stamford secretary and general agent of the company.

Stamford, as manager for the company, put up a gas machine on the residence of the plaintiff, which worked so badly that on the 12th of February, 1874, there was an explosion, which resulted in the bringing of an action by the plaintiff and the recovery of damages as in the declaration alleged.

An exemplification of the judgment, entered on the 29th of February, 1876, was put in as an exhibit at the trial.

The declaration contained several counts :

1. That the defendants agreed with the plaintiff to furnish the plaintiff with a gas apparatus for the plaintiff's house, to be put up at or near plaintiff's house, for the purpose of furnishing the plaintiff with a supply of gas, and should well and sufficiently lay proper and sufficient communication and proper service pipes from such machine to the house, and should erect a sufficient and proper air pump for use therewith ; and should, in other respects, put up and erect a machine so that gas should not escape through such communication, &c. ; and alleging as a breach the non-fulfilment of the terms of the contract, whereby the gas exploded, whereby the plaintiff, his wife, and servant were damaged.

2. That defendants, in consideration that the plaintiff would buy and permit the defendants to erect the machine in the first count mentioned, promised the plaintiff that the machine would produce a good illuminating gas of a

cost of not more than \$1.50 per thousand feet, and that the machine would be in all respects a good and safe machine; and alleging as a breach that the machine produced inferior gas at a cost of \$3, and was not a good and safe machine, and the plaintiff has lost the price of the same, and has expended money in repairs.

3. On a breach of warranty that the machine when put up would be reasonably fit for the purpose, and that gas would not escape into the house; and alleging as special damage, injury to plaintiff's house, &c.

There were also the common indebitatus counts for goods bargained and sold, goods sold and delivered, work done, money lent, money paid, and money had and received.

Pleas: To first and second counts: 1. Did not promise; and 2. Not guilty.

3. To second count: did not promise.

4. That defendants did sell to the plaintiff and did erect and put up a machine reasonably fit for the purpose.

5. To third count: did not warrant as alleged.

6. That the machine was reasonably fit for the purpose for which it was sold and put up.

7. To common counts: never indebted.

There was no award of judgment on the common counts according to the *postea*.

The amount awarded for damages was \$8,300, and for costs \$313.97, making \$8,613.97.

Execution against the goods and chattels of the defendants was issued on the same day to the sheriff of the county of Hastings, and afterwards returned *nulla bona*.

The defendants after the verdict against the company, but before the entry of final judgment, began to place themselves as much as possible beyond the reach of any claim which might be made against them by the plaintiff.

Messrs. Bowell, Lazier, Nunn, and Dickson, on the 7th of February, 1876, certified that Mackenzie Bowell, Samuel Shaw Lazier, and George Dean Dickson, had respectively "paid up his full amount and his shares in full in such company."

Each of these gentlemen, being respectively the presi-

dent and a majority of the trustees, on the same day, personally appeared before the County Registrar, and swore that the certificates were true in substance and in fact.

On the 17th of February, 1876, Mr. Dickson, by a letter addressed to Mr. Bowell, resigned his position as a director in the company, and on the next day Mr. Bowell, by a letter addressed to Mr. Nunn, did likewise.

There was evidence of two other stockholders and trustees being within the jurisdiction of the Court at the time this action was commenced, who might have been sued jointly with the defendants.

The writ in this action was issued on the 23rd of March, 1876.

Counsel for the defence at the close of the case submitted :

1. That the company was not a corporation, and could not be a corporation, because it was not within the terms of the statute.

2. That the proof of incorporation was not sufficient.

3. That the production of the exemplification of judgment proved the defendants' third plea.

4. That the sixth plea was proved : that there was no evidence that the defendants, or any one of them, had subscribed for shares in the capital stock of the company.

5. That the judgment was not recovered on account of any debt existing or contracted by the defendants or the company before the 14th of February, 1874.

6. That the ninth and tenth pleas were proved.

It was admitted that, if the plaintiff was entitled to recover, all the defendants were liable to the full amount of the judgment and interest.

The learned Judge, under 37 Vic. ch. 7, sec. 24, O. reserved his decision.

He afterwards, and before Michaelmas term last, rendered his decision. He was of opinion that the causes of action which the plaintiff had against the Dominion Safety Gas Company were not "debts" or "contracts," within the meaning of sec. 49 of Consol. Stat. C. ch. 63. He found the issues joined on the first, third, seventh, and tenth pleas

in favour of the defendants, and the remaining issues in favour of the plaintiff.

During Michaelmas term, November 23, 1877, cross rules were obtained.

E. Martin, Q.C., obtained a rule, calling on the defendants to shew cause why the verdict entered on the issues found for them should not be set aside, and a verdict entered for the amount of the judgment, costs, and interest in the suit of *Osler v. The Dominion Safety Gas Company*, pursuant to the Law Reform Act, and statutes in that behalf.

G. D. Dickson, obtained a rule, calling on the plaintiff to shew cause why the verdict rendered in his favour on the second, fourth, fifth, sixth, eighth, and ninth issues should not be set aside, and a verdict entered for the defendants, pursuant to the Administration of Justice Act.

During Hilary term, February 12, 1878, both rules were argued together

E. Martin, Q. C., shewed cause to the defendants' rule and supported the plaintiff's rule. He referred to *McKenzie v. Dewan*, 36 U. C. R. 512; *Scales v. Irwin*, 34 U. C. R. 545; *McKenzie v. Kittridge*, 24 C. P. 1, 27 C. P. 65; *Williams v. Harding*, L. R. 1 H. L. 9; *Mullett v. Mason*, L. R. 1 C. P. 559; *Mayne on Damages*, 3rd ed., 167; *Maxwell on Statutes*, 188; *Morris v. Mellin*, 6 B. & C. 446; *Bennett v. Daniel*, 10 B. & C. 500; *Legge v. Tucker*, 1 H. & N. 500; *Randall v. Raper*, 1 E. B. & E. 84; *McLean v. Dun*, 39 U. C. R. 551; *Smith v. Neale* 2 C. B. N. S. 67.

McCarthy, Q. C., (*Dickson* with him,) contra, referred to *Moss v. Steam Gondola Co.*, 17 C. B. 180; *Bailey v. Universal Provident Life Association*. 1 C. B. N. S. 557; *Shortridge v. Bosanquet*, 16 Beav. 84; *Bargate v. Shortridge*, 5 H. L. 297; *Lindley on Partnership*, 3rd ed., 1058; *Tate v. Corporation of Toronto*, 3 P. R. 181; *Boyd v. Haynes*, 5 P. R. 15; *Roberts v. Corporation of Toronto*, 16 Grant 236; *Ex parte Clayton, Re Clayton*, L. R. 5 Ch. 13; *Hunter v. Greensill*, L. R. 8 C. P. 24; *Wickens v. Goatley*, 11 C. B.

666 ; *McIntyre v. McCracken*, 1 App. 1, 1 C. S. R. 479 (a) ; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221 ; *Doe d. Christmas v. Oliver*, 2 Sm. L. C., 7th ed., 751.

March 15, 1878. HARRISON, C. J., delivered the judgment of the Court.

This case comes before us as Jurors as well as Judges.

We must therefore upon the evidence find the facts as well as decide the questions of law which may arise upon the facts so found.

The liability sought to be imposed by the plaintiff upon the defendants is a statutory one. It is for him therefore to satisfy us that he is entitled to recover under the provisions of the statute which he invokes.

He in this action, as against the issues raised, must satisfy us—

1. That there was a company incorporated under Consol. Stat. C. ch. 63, called and known as “The Dominion Safety Gas Company.”

2. That the defendants, at the time the action was commenced, were shareholders or trustees in that company.

3. That as such shareholders or trustees they are responsible for the amount of the judgment which the plaintiff recovered against the company, or some portion of it.

The statute which he invokes is Consol. Stat. C. ch. 63.

It enabled any five or more persons to form a company “for carrying on any kind of manufacturing, shipbuilding, mining, mechanical, or chemical business,” or for other purposes detailed in the first section of the Act. These purposes were afterwards extended by statutes 23 Vic. ch. 30 sec. 1, 24 Vic. ch. 19 sec. 1, 29 Vic. ch. 21.

This was to be done by means of filing a declaration or statement, the contents of which are given, which statement or declaration was required under section 2, amended by 24 Vic. ch. 19, sec. 2, to be acknowledged in duplicate

(a) This is the abbreviation adopted for the Canada Supreme Court Reports.

before the registrar of the district or county or his deputy. These duplicates were to be disposed of in a particular manner described in section 3 of the Act.

"When the formalities prescribed in the foregoing sections" were complied with, the persons who signed the statement or declaration, and their successors, were created "a body corporate by the name mentioned therein": Sec. 4.

A copy of the whole of the registered declaration, certified by the district or county registrar, or his deputy, to be a true copy, was, by section 6, made "in all Courts and places as *primâ facie* evidence of the facts therein stated."

Compliance with the formalities prescribed in the formation of the company might, by section 7, be "conclusively established" by the insertion in the *Canada Gazette* of a notice to that effect by the provincial secretary.

The statement or declaration certified as the Act directs was produced at the trial. It must, therefore, be received as *primâ facie* evidence of the facts therein stated,

It stated the name and purpose of the company. It also stated the amount of the capital stock, the number of shares, all of which were represented as "now paid." It defined the number of trustees to manage the concerns of the company, and gave their names. It declared that the "manufacturing operations" of the company were to be carried on in and adjacent to Belleville, and "the *other* operations of the company 'to be carried on throughout the Dominion of Canada.'" The object for which the company was formed was "the manufacture and (or) sale of the machinery and materials for the manufacture or production of gas from evaporating fluids, and gas fixtures of all kinds, and such other articles as may from time to time be deemed advisable, *and also* the lighting of cities, towns, villages, streets, capital buildings, steamboats, coaches, and street and railroad cars with gas."

The objection is, that the latter purpose is not one for which a company could be lawfully incorporated under the Act, and as this was apparently the purpose for which the operations of the company were to be carried on "through-

out the Dominion of Canada," so much of the incorporation was *ultra vires*.

While we think the company had power to manufacture and sell, and if necessary place gas machines for use, and to supply the gas for use in buildings, steamboats, coaches, and street and railroad cars, throughout the Province, (see sec. 5,) we do not think that they had power under the Act to light cities, towns, and villages throughout the Dominion of Canada. But this is an objection which does not, in our opinion, destroy the power of the corporation to exist for the lawful purposes which are mentioned. The existence of the corporation is one thing; its powers another. Where some purposes are *infra vires* and others *ultra vires*, the corporation may well exist, limited however in its operation to the lawful powers.

The objection is one which does not come with good grace from these defendants, who were the majority of the shareholders, and majority of trustees in the corporation almost from its inception.

Where a corporation has received the benefit of a contract it is not usually permitted to raise the question of *ultra vires* in reference to such a contract: *Clarke v. Sarnia Street Railway Co.*, 42 U. C. R. 39. This principle has since been affirmed by Lord Blackburn, in *Doolan v. Midland Railway Co.*, L. R. 2 App. 792, 806, where he said: "It is impossible to suppose that the Legislature intended those companies who were wrongfully working steamers to be in a better position than those who were rightfully working them; and the Act should not be so construed if the words permit of any other construction. And even if the words compelled this construction, I think the railway could not set up its own wrong against a plaintiff who contracted with the company in innocence and ignorance."

It is true the defendants are not the company, but being the majority of the trustees and majority of the shareholders who obtained the benefit of the plaintiff's contract, they appear to come within the *ratio decidendi* of these cases. But as we are of opinion that the company had the

power to make some contracts, and that the contract made with the plaintiff was one of them, it is unnecessary to rest our decision upon any ground of estoppel.

It was also objected that there was no proof of the duplicate statements and declarations, and of the disposition of them in the manner directed by the Act; but this we may, we think, fairly infer from the facts which are in evidence: See *Boston Acid Manufacturing Co. v. Moring*, 15 Gray 211; *Newcomb v. Reed et al.*, 12 Allen 362.

If these defendants and the other two alleged shareholders not sued were not incorporated, their condition as regards the creditors of the company would not be improved by holding, as we might in that case be obliged to hold, that they are partners in a trading company and jointly and severally liable for all the obligations of the company: See *Patterson v. Holland*, 6 Grant 414; *S. C.*, 7 Grant 1; *Unity Insurance Co. v. Cram*, 43 N. H. 636.

In this respect the language used by Proudfoot, V. C., in *McKenzie v. Kittridge*, 27 C. P. 83, is worthy of attention. He said of this statute, at p. 93: "The statute enables persons desirous of embarking in certain commercial undertakings to exempt themselves from the common law liability of partners by acquiring a corporate existence, and complying with certain stipulations prescribed in the Act. These stipulations must be complied with, otherwise the original liability remains."

We are of opinion that the Dominion Safety Gas Company was an incorporated company within the meaning of Consol. Stat. C. ch. 63, and to this extent are in favour of the plaintiff.

The next enquiry is, whether it sufficiently appears that the defendants were stockholders or trustees in that incorporated company. The Act in no part of it gives a definition of a shareholder; but so far as the conditions necessary to constitute the status of a shareholder can be gathered from the reading of the Act, they must be observed. There is less difficulty in determining under the Act the status of a trustee.

The stock, property, and concerns of the company are, by sec. 9, to be managed by not less than three nor more than nine trustees, "who shall respectively be stockholders of the company." The trustees are, by sec. 10, to be annually elected by the stockholders at such time and place as directed by the by-laws of the company. The election, by sec. 12, is to be made by such of the stockholders as attend for that purpose. Each stockholder is, by sec. 13, to be entitled to as many votes as he owns shares in the stock of the company. The persons receiving the greatest number of votes are, by sec. 14, to be trustees. The trustees are, by sec. 17, to elect from among themselves a chairman or president. Subordinate officers, by sec. 18, are to be appointed by the trustees. The trustees, by sec. 19, have power to make by-laws for purposes specified. Among these is the power to appoint the trustees of the company. "who are not to exceed nine nor be less than three." The trustees, by sec. 21, are empowered to call in and demand from the stockholders all sums of money "*by them subscribed*," at such times and in such payments or instalments as may be provided. Power is given, by secs. 22 and 32, to enforce payment of the capital stock by action in any of the Courts of law.

We infer from the reading of section 21 that the Legislature contemplated subscription for stock as necessary to constitute the status of a shareholder, who might be compelled by the company to pay the amount of the stock which he was supposed to hold.

It is clear that the defendants never subscribed for stock; but the argument against them is, that by their conduct they are estopped from denying that they did become shareholders.

The question is, not whether these defendants not having subscribed for stock, but having acted as trustees of the company, are by their conduct, as against the company, estopped by their conduct from denying that they are stockholders: *The Sheffield R. W. Co. v. Woodcock*, 7 M. & W. 574; *The Cheltenham R. W. Co. v. Daniel*, 2 Q. B. 281;

Bank of Hindustan v. Alison, L. R. 6 C. P. 54; *Re Bank of Hindustan*, L. R. 9 Ch. 1; but whether, as against this plaintiff, who sues as a creditor of the company, there is any such estoppel.

Whether a person is liable as a shareholder to be proceeded against by the creditors of an incorporated company, has been held at law to depend upon whether such person is entitled by the regulations of the company to exercise the rights of a shareholder therein. The doctrine of estoppel has not at law been applied in these cases so as to enable a creditor to proceed against a person who, though not a shareholder, has been treated by the company as if he were one.

This is the statement of the law by Sir Nathaniel Lindley, now one of the Justices of the Common Pleas Division of the High Court of Justice, in his well known Work on Partnership, 3rd ed., vol. i., p. 141.

The cases to which he refers: *Moss v. The Steam Gondola Co.*, 17 C. B. 180; *Bailey v. Universal Provident Life Association*, 1 C. B. N. S. 557, appear to sustain this statement of the law, and the subsequent cases confirm it: *The Marquis of Abercorn's Case*, 4 DeG. F. & J. 78; *In re Metropolitan Public Carriage and Repository Co.*, L. R. 9 Ch. 102; *Portal v. Emmens*, L. R. 1 C. P. D. 201; *In re British Provincial Life Association*, 36 L. T. N. S. 329; *In re Percy et al.*, L. R. 5 Ch. D. 705; *Hamley's Case*, L. R. 5 Ch. D. 705; *Jenner's Case*, L. R. 7 Ch. D. 132; *Hallmark's Case*, 38 L. T. N. S. 413.

We are, bound by these authorities.

While it is apparent that these defendants acted as shareholders, we see no evidence of their having ever subscribed for stock or otherwise become shareholders, so as to be subject to suit for the debts or liabilities of the company, and in whatever other capacity they may be liable to this plaintiff, we are of opinion that they cannot, on the authorities, be held liable to him as shareholders.

This opinion renders it unnecessary for us to refer to secs. 33, 34, 35, 36, and 37 of the Act, as to the liability of

shareholders, under the Act, and the conflicting decisions as to the proper construction of these sections: See *McKenzie v. Kittridge*, 24 C. P. 1, 145; S. C., in Appeal, 27 C. P. 65, and *McKenzie v. Dewan*, 34 U. C. R. 512.

But it is next insisted that the defendants are liable as trustees under different clauses of the Act to which we referred. It may be that having acted as trustees, whether legally qualified or not, they cannot now excuse themselves from the consequences of misconduct in office by setting up their own want of qualification for the office. And in this view we shall proceed to notice the sections of the Act under which it is attempted to impose liability upon them.

The trustees were required by sec. 23 to cause a book to be kept, containing in alphabetical order the names of all persons who are or have been stockholders of the company, giving specific information as to them, as well as giving "a statement of all the existing debts and liabilities of the company." This book was, by sec. 26, made *prima facie* evidence of the facts therein contained in favour of the plaintiff in any suit or proceeding against the company, or against one or more stockholders. A company neglecting to keep such a book open for inspection, by sec. 28 forfeited its corporate rights. It does not appear that the trustees kept such a book. The company by sec. 47 was required annually, within twenty days from the 1st of January, to make a report, to be inserted in some newspaper published nearest to the place where the business is carried on, stating the amount of the capital stock of the company, together with the amount of the "existing debts" of the company. It was necessary under sec. 48 that this report should be verified by the oath of the chairman or president or secretary of the company. The trustees of any company failing to comply with the requirements of the last two preceding sections were, by sec. 49, made jointly and severally individually liable for all "the debts of the company then existing, and for all contracted until such report shall be made." If "the indebtedness" of the company at any time should exceed the amount of its capital stock, the

trustees assenting thereto were by sec. 53 made personally and individually liable to the creditors of the company "for the excess."

It is charged that the defendants, as trustees of the company, failed within twenty days from the 1st of January, 1875, to make and publish such a report; or if such a report were made to state therein the demand of the plaintiff as being "one of the existing debts of the company;" and in consequence it is urged that the defendants are jointly and severally liable for "all the debts of the company then existing," including the plaintiff's demand.

This presents the question whether before the 1st of January, 1875, the demand of the plaintiff against the company was an existing debt, and whether, on the 20th of January, 1875, it continued to be an existing debt of the company.

The plaintiff had at that time entered into a contract with the company for the erection at his residence of one of their gas machines, and to supply the same with gas, for reward to be paid to them in that behalf. In February thereafter there was an explosion, resulting in damages to the plaintiff for which the company was liable either upon the express or implied warranty of the contract. The judgment, which is the foundation of this action, and which was not entered till the 29th of February, 1876, was the recovery of damages in respect of this breach of contract.

It is impossible to hold that the liability of the company, under that contract, either on the 1st of January, 1875, or the 20th of January, 1875, was an "existing debt" of the company or "indebtedness" in excess of their capital stock. It was nothing more than a liability arising out of a contract which might or might not result in damages.

There is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which nevertheless the remedy for the breach for non-performance is indifferently either in assumpsit or case. Such are actions against attorneys, surgeons, and other professional men, for want of compe-

tence and skill, or proper care in the service which they undertake or render; actions against common carriers, against ship owners on bills of lading, against bailees of different descriptions, and numerous other instances in which the action is brought either in tort or contract, at the election of the plaintiff: see *per* Tindal, C. J., in *Boorman v. Brown*, 3 Q. B. 525, 526. And there are certain advantages which are still incidental to the form of the procedure to be adopted in particular cases: *McLean v. Dun*, 39 U. C. R. 561. But where it is necessary to resort to the substance of the cause of action, the distinction between contract and tort has been constantly maintained: see *per* Erle, C. J., in *Alton v. The Midland Railway Co.*, 19 C. B. N. S. 213, 237.

Although it may be fairly argued that the plaintiff's action against the company, as declared by the judgment against the company, was for a breach of contract: see *Legge v. Tucker*, 1 H. & N. 500; *Morgan v. Rabey et al.*, 6 H. & N. 265; *Fullan v. Great Western R. W. Co.*, 3 E. & E. 844; *Baylis v. Lintott*, L. R. 8 C. P. 345; *Pontifex v. The Midland R. W. Co.*, L. R. 3 Q. B. D. 23; yet as the damages in such an action were necessarily unliquidated, there is really no pretence for the argument that there was any existing debt until the entry of judgment on the 29th of February, 1876: see *Johnson v. Diamond*, 11 Ex. 73; *Dresser v. Johns*, 6 C. B. N. S. 429; *Jones v. Thompson*, 7 E. B. & E. 63; *Tate and Corporation of Toronto*, 3 P. R. 181; *Bank of Toronto v. Burton*, 4 P. R. 56; *Boyd et al. v. Haynes*, 5 P. R. 15.

We are forced to the conclusion that, notwithstanding the meritorious nature of the plaintiff's demand, he fails in his action brought against these defendants, either in the character of shareholders or trustees of "The Dominion Safety Gas Company."

The plaintiff's rule must be discharged, and the defendants' rule made absolute to enter a nonsuit.

Rules accordingly.

THE THIRD NATIONAL BANK OF CHICAGO V. MORGAN
COSBY AND EDMUND S. VINDEN.

*Promissory notes—American currency—Evidence of experts—Stamps—
Double duty—Cancellation—Knowledge, when first acquired.*

Held, that a president of a bank in a foreign country, whose business it is to deal with money therein, though not a lawyer, is an admissible witness to prove the law of that country, as to what is money there.

Held, also, that a promissory note made in Canada and payable in the United States, and in the currency thereof, without the words "and not otherwise or elsewhere," was a good promissory note, for that it was payable generally and might be sued on here. *Bettis v. Weller*, 30 U. C. R. 23, overruled, and *Greenwood v. Foley*, 22 C. P. 352, followed.

Two promissory notes made in Canada, payable in the United States, were insufficiently stamped; on one the stamps were insufficient in amount, and the stamps had not been cancelled on either when the note was made. In June, the notes were placed for collection in the hands of plaintiffs' attorney in Canada, who, on August 29th, wrote to the plaintiffs, a bank in the United States, who were the holders thereof and ignorant of our stamp laws, and requesting them to affix double duty, which was immediately done, and the stamps cancelled by writing thereon the date of cancellation and the initials of the cashier, with his description of office as such.

Held, that the plaintiffs first acquired knowledge of the defective stamping on the receipt of the letter of August 29th: that the knowledge of the attorney in June, if then acquired, was not the knowledge of the plaintiffs; and that the cancellation by the cashier was sufficient, though the initials of the bank were not used, nor its corporate seal.

Semble, that the knowledge intended by the statute is actual knowledge, and that constructive notice will not suffice. *Waterous v. Montgomery*, 36 U. C. R. 1, remarked upon.

THE declaration contained two counts.

The first was on a promissory note, dated 11th September, 1875, made by the defendant Cosby to the defendant Vinden, at the office of the plaintiffs in Chicago, payable nine months after date, for the sum of \$893.06, American currency, to wit lawful money of the United States, with interest at the rate of 10 per cent. from date, endorsed to the plaintiffs.

The second was on a promissory note, dated 14th March, 1876, made by the defendant Cosby to the defendant Vinden, payable at the office of the plaintiffs in Chicago, three months after date, for the sum of \$893, American currency, to wit lawful money of the United States, with

interest at 10 per cent. from date, also endorsed to the plaintiffs.

The defendant Cosby pleaded that he did not make the notes. The defendant Vinden pleaded that he did not endorse them: that the notes were not duly presented for payment; and that there was no notice of dishonour. Both the defendants pleaded pleas to the effect that the notes were not duly stamped.

The remaining plea, to which there was a demurrer, and which was held good on demurrer, will be found in 41 U. C. R. 402.

There was issue on the pleas.

The cause was tried before Gwynne, J., without a jury, at Cobourg, at the Fall Assizes of 1877.

The making and endorsing of the notes were admitted. It was also admitted that the defendants resided at Port Hope, in the Province of Ontario, and that the notes were made there.

The plaintiffs proved the presentment of the notes at the plaintiffs' bank in Chicago, protest, and notices of dishonour.

The first note fell due on 14th June, 1876, and the second on 17th June, 1876. The writ was issued on 27th June, 1876. The pleas were not filed till 12th October, 1876.

When the plaintiffs received the notes in Chicago, knowing nothing of the laws of Canada, they supposed them to be properly stamped, and knew nothing to the contrary till 29th August, 1876, when the plaintiffs' attorney addressed to the cashier of the plaintiffs, the following letter:—

“PORT HOPE, 29th August, 1876.

“Third N. B. Chicago v. Cosby and Vinden.

“DEAR SIR,

“Mr. Macgregor, agent of Bank of Montreal here, has placed in my hands for collection the accompanying promissory notes (two) of which, I presume, he advised you. One, that of September, 1875, does not appear to have had the requisite stamps affixed in the first instance. There should have been 30 c. instead of only 27 c. The other has a sufficient amount (30 c.), but neither seems to have been obliterated at the time the notes were given. They

will now require double duty, that is 60 c. upon each, which I send pinned to the notes. On receipt affix, putting on each stamp the day, month, and year when actually affixed, together with initials. * * * When done, please return.
"N. K."

The notes were, by letter dated 2nd September, 1876, returned to the plaintiffs' attorney by L. V. Parsons, Esq., the then cashier of the plaintiffs, with stamps affixed, and cancelled as directed. The stamps were dated of the date of cancellation (2nd September, 1876), and bore the initials of L. V. Parsons, describing himself as cashier of the plaintiffs.

John Irving Pearce, the president of the plaintiffs' bank, was examined as a witness at the trial. He proved the foregoing facts. He also proved that American currency is currency issued by the Government of the United States, that it is sometimes called Greenbacks, and are legal tenders in the United States and pass current for money, that the unit of the American currency is a dollar: that greenbacks are issued in dollars and multiples of a dollar: that they are legal tenders at their face value for all private debts, and for all public debts, except duties on imports, and interest on the public debt: that gold has, from time to time fluctuated in value, but not greenbacks: that the price of gold on 14th June, 1876, was \$1.12 $\frac{3}{4}$, and on 17th June, 1876, was \$1.12 $\frac{5}{8}$.

Objection was made on the part of the defence to the effect, that as the witness was not a lawyer, he was not competent to speak as to the legal effect of American currency or greenbacks, but the learned Judge overruled the objection and received the evidence.

When the evidence was closed it was also objected that the instruments sued on were not promissory notes, and could not be sued upon as such: that they are payable generally, not being payable in Chicago and "not otherwise or elsewhere," and so payable in Canada: that the stamps were not affixed in sufficient time: that the cancellation by the cashier did not sufficiently comply with the statute.

The learned Judge thought the notes cancelled in sufficient time and otherwise rightly cancelled, and held that

if there was any error it could still be rectified, as he was of opinion and found that it was not from any intent to defeat the law that the mistake, if any, had been made.

It was then agreed that it should be assumed that additional stamps were at the trial put on and cancelled by the president with his initials, and the insertion that this was done by him as president of the plaintiffs' bank.

The learned Judge then found as a fact that "American currency," at the time of the making of the notes was and still is money of the United States of America, and that the value of the notes in the money of Canada at the time the notes fell due was \$851.96 for the one, and \$872.60 for the other. He accordingly entered a verdict for the plaintiffs for \$1,795.55.

In Michaelmas term, November 27, 1877, *T. M. Benson* obtained a rule calling on the plaintiffs to shew cause why the verdict should not be set aside and a verdict entered for the defendants, or a nonsuit, on the ground that the instruments sued on as promissory notes and given in evidence at the trial, were not promissory notes; and also on the ground that the instruments, if promissory notes, were not duly stamped as required by law, and were invalid and of no effect in law or equity.

In this term, February 15, 1878, *McMichael*, Q.C., shewed cause.

Benson, contra.

The arguments and cases cited sufficiently appear from the judgment.

March 15, 1878. HARRISON, C. J., delivered the judgment of the Court.

The only exceptions taken to the declaration when this cause was before us on demurrer, (*a*) were :

1. That the instruments declared on in the declaration as promissory notes are not promissory notes, by reason of their not being for the payment of any sum or sums certain in money or specie.

2. That the instruments are not promissory notes, by reason of their being for stated amounts in American currency, and not payable in money.

We overruled both of these objections, holding that if the notes be for the payment of what is deemed money, it is wholly immaterial in the money or currency of what country the notes are made payable.

We however held that the last plea, which described American currency, and denied that American currency is money in the United States, is a good plea as tendering an issue of fact; and at the same time, at page 414, said: "If United States currency should be found to be such as described in the plea, and still be found to be the money of the United States, or money in the United States, as in the declaration alleged, the finding must be against the plea."

The finding of the learned Judge who has since heard this cause is now against the plea, but the first objection now made, although not insisted upon in the *rule nisi*, is that the only evidence to prove that American currency is money in the United States, was a banker, and not a lawyer or member of the legal profession.

It is a rule of English law, that no knowledge of foreign law is to be imputed to an English Judge sitting in a Court of mere English jurisdiction.

This being the case, foreign law and its application, like any other results of knowledge and experience in matters of which no knowledge is imputed to the Judge, must be proved as facts are proved by appropriate evidence, *i. e.*, by properly qualified witnesses, or by witnesses who can state from their own knowledge and experience gained by study and practice, not only what are the words in which the law is expressed, but also what is the proper interpretation of those words, and the legal meaning and effect of them as applied to the case in question: *Earl Nelson v. Lord Bridport*, 8 Beav. 527.

Witnesses in giving their testimony on foreign law may, if they see fit, refer to laws or to treatises for the purpose of aiding their memory upon the subject of their examina-

tion, but in general it is the testimony of the witness and not the authority of the law or of the text writer detached from the testimony of the witness which is to influence the Judge: *Ib.* See also *Sussex Peerage Case*, 11 Cl. & F. 85; *Barrows v. Downs*, 11 Am. 283.

It is not desirable, even with the consent of parties, that the English Judge should construe the law of the foreign country, instead of the fact of what is the law there being proved by lawyers of such foreign country: *Meagher v. Aetna Ins. Co.*, 20 Grant 354. See further, *Earl Nelson v. Lord Bridport*, 8 Beav, 547; *Arnold v. Higgins*, 11 U. C. R. 446.

But while foreign laws are usually proved by foreign practising lawyers—*Bristow v. Sequeville*, 5 Ex. 275; *Re Bonelli*, L. R. 1 P. & D. 69—any person, be he a practising lawyer or not, who comes within the description of a person *peritus virtute officii*, may be received as a witness for that purpose. Thus a Roman Catholic Bishop holding the office of coadjutor to a Vicar Apostolic in England, was in virtue of that considered as a person skilled in the matrimonial law of Rome, and therefore admissible as a witness to prove that law: *Sussex Peerage Case*, 11 Cl. & F. 85, 134.

Lord Langdale, in that case, at p. 134, said: "The witness is in a situation of importance; he is engaged in the performance of important and responsible duties; and connected with them, and in order to discharge them properly, he is bound to make himself acquainted with this subject of the law of marriage. That being so, his evidence is of the nature of that of a Judge. It is impossible to say that he is incompetent."

In *Doncket v. Thellusson*, 8 C. B. 812, which was an action on two foreign promissory notes made in Belgium, there were several pleas alleging that by the law of Belgium, certain things were necessary to constitute a good promissory note, all of which the notes in question wanted, and it was held that an hotel-keeper in London, a native of Belgium, who had formerly carried on the business of a merchant and commissioner of stocks in Brussels, was competent to prove the foreign law.

Mr. Justice Maule, in delivering judgment, at p. 825, said: "I think that, inasmuch as he had been carrying on business which made it his interest to take cognizance of the foreign law, he does fall within the description of an expert."

This case is conclusively in favour of the admission of the president of a bank, whose business it is to deal with money in the foreign country, for the purpose of proving as an expert the law of the foreign country as to what is money in that foreign country.

The rule is thus stated in Powell's Law of Evidence, 4th ed., 302: "Such laws" (foreign laws) "must be proved like facts by skilled witnesses. It is held that the witness must either be a professional man, such as an advocate or a Judge; or connected in such a way with the profession, or to have had such daily experience of the law in question, as to create a reasonable presumption that he has a competent knowledge of it."

The rule is thus stated in *Roscoe's N. P.*, 13th ed., 139: "The competency of the witness to prove foreign law is a question for the Court, and the only general rule that can be collected from the reported cases is, that the witness must from his profession or business have had peculiar means of becoming acquainted with that branch of law, which he is called to prove."

See further, *Taylor on Evidence*, 7th ed., vol. ii., p. 1197.

The authorities up to 1845, will be found carefully arranged according to their dates in a note to 8 Beav. 546. The leading authorities since are all above mentioned.

The investigation of them, which we have made, leaves no room to doubt the propriety of admitting the testimony challenged in this case. The weight of it was a matter in the first instance for the consideration of the learned Judge who tried the cause without a jury. So far as we are called upon to review his decision, we are of opinion that the learned Judge did not attach too much weight to the testimony of such a skilled witness on such a question of

foreign law as was for his decision. Without meaning to cast any reflection on the learning or ability of the legal profession in the United States, we may say, we think the United States Banker examined in this case was as competent to testify as to what is money in the United States as any practising lawyer in the union, and perhaps more competent than one half of the practising lawyers of that country.

The notes sued upon were produced and proved at the trial. On their production they appear to have been made and dated at Port Hope, in Canada, payable at the office of the Third National Bank of Chicago, but without the restrictive words "and not otherwise or elsewhere."

It is insisted that the legal effect of the notes is, that they are payable generally in Canada, and not exclusively in the foreign country, and being in the currency of a foreign country, are not valid promissory notes in this country.

This objection was not raised as a ground of demurrer to the declaration, and is now for the first time before us for decision.

It is enacted by sec. 5 of Consol. Stat. U. C. ch. 42, that "In case any person accepts a bill of exchange, payable at a Bank, or at any other particular place, without further expression in his acceptance, or makes a promissory note payable at a bank, or at any particular place, without further expression in that respect, such acceptance and such promise shall be deemed and taken to be a general acceptance and a general promissory note respectively."

Section 6 of the same Act enacts: "But if the acceptor expresses in his acceptance that he accepts the bill payable at a bank, or at any other particular place *only and not otherwise or elsewhere*; or if the maker of a promissory note expresses in the body of the note that he promises to pay at a bank, or at any other particular place *only and not otherwise or elsewhere*, then such acceptance or promise shall be deemed and taken to be a qualified acceptance or promise; and the acceptor or maker shall not be liable to pay the bill or note, except in default of payment when such

payment has been first duly demanded at such bank or other place."

Section 11 of the same statute enacts that "in case any promissory note payable only at some place in the United States of America, or in some one of the British North American colonies not being Canada, and not otherwise or elsewhere, *be made or negotiated* within Upper Canada, and be protested for non-payment, the holder shall, in addition to the principal sum mentioned in the note, recover damages at the rate of four per cent. upon such principal sum, and also interest thereon at the rate of six per centum per annum, to be reckoned from the day of the date of the protest," &c.

These clauses are re-enactments of our old Statutes 7 Wm. IV. ch. 5, sec. 1; 12 Vic. ch. 22, sec. 4; and 12 Vic. ch. 76, sec. 2, under which there are some decided cases to which it is necessary to refer.

In *Bradbury v. Doole*, 1 U. C. R. 442, it was held, under statute 7 Wm. IV. ch. 5, that a promissory note made in Upper Canada, payable in Montreal in Lower Canada, was an inland or domestic note, being in effect payable generally.

In *Ross et al. v. Winans et al.*, 5 C. P. 185, it was held that on bills of exchange drawn in Upper Canada, addressed to a person residing in Upper Canada, and payable at the Union Bank of London, in London, England, damages in addition to interest were recoverable under Statute 12 Vic. ch. 76; for being drawn payable at a certain place in Europe—the Union Bank of London in London—they are in effect drawn upon and accepted by the drawee payable at that place though his acceptance be general within the 7 Wm. IV. ch. 5.

In *Wilson v. Aitkin*, 5 C. P. 376, a promissory note was made in Upper Canada for a sum of money expressed to be sterling, payable at the office of the payees in Glasgow, without the words "and not otherwise or elsewhere," and it not appearing that the notes were in fact presented there for payment, it was held that the plaintiff was not, under 7 Wm. IV. ch. 5, and 12 Vic. ch. 76, sec. 72, entitled to recover the difference of exchange in addition to interest.

In *American Exchange Bank v. McMicken*, 8 C. P. 59, it was held under 7 Wm. IV. ch. 5, and 12 Vic. ch. 76, following *Ross v. Winans*, 5 C. P. 185, that the holder was entitled to recover damages in addition to interest upon a bill of exchange accepted in Upper Canada, payable at the Bank of Commerce in the city of New York.

In *Foster et al. v. Bowes*, 2 P. R. 256, it was held, upon a bill drawn in London, accepted in Canada, payable at the office of Messrs. J. F. Powson & Co., St. Paul's Church Yard, London, it not appearing that the bill had been negotiated in Upper Canada, that no damages were recoverable under Stat. 12 Vic. ch. 76.

In *Royal Bank of Liverpool v. Whittemore et al.*, 16 U. C. R. 429, it was held that the holder of a bill drawn in Toronto, payable in London, England, was entitled to recover damages under the Statute 12 Vic. ch. 76.

In *Meyer et al. v. Hutchinson et al.*, 16 U. C. R. 476, it was held that the holder of a note made in Canada, payable in New York, but not there only, was not entitled to damages under the 12 Vic. ch. 76, in addition to interest.

These cases under the old statutes are not apparently in perfect accord, but it is unnecessary for us in this case to examine them closely, in order, if possible, to reconcile them.

There is a case decided since the Consolidated Statutes, which, under the circumstances, we think we are bound to follow, and that is *Hooker v. Leslie et al.*, 27 U. C. R. 295.

It was there held that a note made in this Province payable at a particular place in the United States, but "not otherwise or elsewhere," is payable generally, and governed by the law and currency of the place where made.

The question therefore now is, whether a promissory note made in this Province and payable in American currency or lawful money of the United States, is a good promissory note.

It now appears as a fact that the note is payable in money. But it is argued that, as it is the money of a foreign country, and as the note is in effect payable in

Canada, the money not being the money of Canada, the instrument is not a good promissory note in Canada.

In *Chitty* on Bills, 9th ed., 133, referring to 1 Pardess. 331, 332, it is said it is not necessary "that the money should be that current in the place of payment, or where the bill is drawn; it may be the money of any country whatever."

This is made the foundation of the decision in *St. Stephen's Branch R. W. Co. v. Black*, 2 Hannay 139, where the Supreme Court of New Brunswick held the law to be the same in the case of a promissory note made in that Province payable in that Province in "United States currency."

In *Greenwood v. Foley*, 22 C. P. 352, the note, as here, was made in Canada payable in New York, for \$581.40, without the restrictive words, "and not otherwise or elsewhere," and the objection was, that the note could not be sued in Canada, where all the parties lived, being payable in American currency, but the Court held the contrary.

Hagarty, C. J., in delivering judgment, said: "As to the point that the note could not be sued on here, we do not see how a note may not be made and endorsed in Canada, payable in New York, for a stated sum in dollars, American currency, the money of the place of payment. The cases cited do not support such a proposition."

This case is directly in point against the defendants, and we would follow it without further remark, being the last decision upon the point, were it not for the prior contrary decision of *Bettis v. Weller et al.*, 30 U. C R. 23.

In *Bettis v. Weller et al.*, a note made in this Province, payable generally for \$200, current funds of the United States of America, was held not to be a good promissory note. The Court then consisted of Mr. Justice Morrison and Mr. Justice Wilson, in the absence of the Chief Justice from illness. Mr. Justice Wilson has since said of that case: "Why 'current funds of the United States of America,' which was the expression in *Bettis v. Weller*, 30 U. C. R. 23, (in which judgment I concurred), should not be suf-

ficiently certain, I do not at present perceive:" 41 U. C. R. 404.

The majority of the members now composing this Court were not in the Court when *Bettis v. Weller et al.* was decided. Mr. Justice Wilson, who is still a member of the Court, does not now approve of it. Under the circumstances our proper course is to overrule it, which we now do, and follow the last decision on the point.

In our opinion, in accordance with that of the Court of Common Pleas in *Greenwood et al. v. Foley*, 22 C. P. 352, and other cases to which we have referred, a promissory note made here, payable in the United States in the currency of the United States, is a good promissory note.

The only defence remaining for consideration is involved in the question whether the notes were sufficiently stamped according to the laws of Canada.

The notes were made in this Province payable in the United States. Each of them bears interest at the rate of ten per cent. per annum from date. The first of them at one time had only 27 cents instead of 30 cents of stamps placed upon it. The second was sufficiently stamped as to amount, but the stamps were not obliterated at the time the note was given. This objection applied to both notes. The holders of the notes, who were residents of the United States, were ignorant of our laws and ignorant of the defective stamping till the receipt of the letter from their attorney dated 29th August, 1876. On the receipt of that letter double stamps were forthwith placed on each note, and each stamp cancelled with the date of cancellation 2nd September, 1876, and the signature L. V. Parsons, the then cashier of the plaintiffs, who on each stamp so described himself.

It is not pretended that the omission properly to stamp the notes was from any intention on the part of the plaintiffs to violate our law, or was otherwise than the result of a mere error or mistake, and of this the learned Judge was satisfied, and so found.

Such a defence, under such circumstances, is one of which

an honest man having no other defence ought to be ashamed, and one which no Court of Justice will assist if consistently with the law as it is written the Court can decline to do so.

The Statute of Canada, which was in force when these notes were made, and afterwards double stamped, was 37 Vic. ch. 47, D., passed on 26th May, 1874.

The second section substitutes a new and amended section for section 12 of the previous Act, 33 Vic. ch. 13, D. The substituted section is as follows "Any *holder* (omitting the words subsequent party, &c., used in the previous Act) of such instrument may pay double duty :—

1. By affixing to such instrument a stamp or stamps to the amount thereof, or to the amount of double the sum by which the stamps affixed fall short of the proper duty.

2. And by writing his initials on such stamp or stamps.

3. And the date on which they were affixed.

Where in any suit or proceeding at law or equity the validity of any such instrument is questioned by reason of the proper duty thereon not having been paid at all, or not paid by the proper party or at the proper time, or of any formality as to the date or erasure of the stamps affixed having been omitted, or a wrong date placed thereon, and it appears that the holder thereof, when he became such holder, *had no knowledge* of such defects, such instrument shall be held to be legal and valid :—

1. If it shall appear that the holder thereof paid double duty as in this section mentioned *so soon as he acquired such knowledge, even although such knowledge shall have been acquired only during such suit or proceeding.*

2. And if it shall appear in any such suit or proceeding to the satisfaction of the Court or Judge, as the case may be, that it was *through mere error or mistake*, and without any intention to violate the law on the part of the holder that any such defect as aforesaid existed in relation to such instrument :

Then such instrument, or any endorsement or transfer thereof, shall be held legal and valid, if the holder shall pay the double duty *as soon as he is aware* of such error or mistake."

Sec. 3. "Any *bank* or any *broker* who makes, draws or issues or negotiates, presents for payment, or pays, or takes, or receives, or becomes the holder of any instrument not duly stamped, either as a deposit, or in payment, or as a security, or for collection or otherwise, *knowing* the same not to be duly stamped, and who does not *immediately* on making, drawing, issuing, negotiating, or presenting for payment, or paying, or taking, or receiving, or becoming the holder of such instrument, affix thereto and cancel the proper stamps," &c., "shall incur a penalty of \$500 for every such offence; and shall not be entitled to recover on such instrument, or to make the same available for any purpose whatever, and any such instrument shall be invalid and of no effect in law or equity."

It was intimated in *Le Banque Nationale v. Sparks*, 27 C. P. 320, that the privilege to holders who, from error or mistake, do not at the proper time affix the proper duty, does not apply to banks and brokers, but the Court of Appeal, in the same case, took a different, and it must be assumed the correct view of the law: S. C. 2 App. 112.

The penalties to which banks and brokers are subjected by sec. 3 of 37 Vic. ch. 47, only arise when the bank or broker *knowing* that the instrument is not duly stamped accepts it and omits immediately to affix the proper stamps, &c.

This enactment can only apply to Canadian banks and brokers who, from living in the country and doing business in it, are bound to know, and who from their callings are presumed to know, our laws.

It can have no penal application upon banks, like these plaintiffs, doing business in a foreign country, and so not bound to know, or from their callings supposed to know, our laws.

Foreign banks and brokers (whatever doubt, if any, there may be as to our own banks and brokers), certainly have all the privileges of an ordinary holder of a promissory note to make the same valid by stamping it in the manner and at the time prescribed by the Act.

Objection in this case is made both as to the manner and the time, but principally as to the time.

The manner of cancellation was, by writing on the stamps the date of cancellation and the signature of the cashier, followed by his description of office.

The contention on the part of the defendants, as we understand it, is, that the initials should be the initials of the bank, and that these should appear under the corporate seal of the bank.

The Act is not definite as to the mode of cancellation when the holder of a bill or note is a Corporation. In language it provides only for cancellation by holders who are natural and not artificial persons, such as bodies corporate. But there can be no good reason for so restricting the operation of the Act. It must be held applicable to all holders whether natural or artificial persons.

The point came up for consideration in *Le Banque Nationale v. Sparks*, 27 C. P. 320, and there are some observations of Hagarty, C. J., bearing on the point, which may be here quoted. He said, at p. 332: "We cannot say that it is wholly unimportant to require the name or initials as well as the date, the object being to secure proof that the stamps were cancelled by the bank, or some one acting for the bank, at the named date. There need be no difficulty in the case of a bank. The initials of the bank could easily be put. Possibly the initials of the official might suffice."

In *Le Banque Nationale v. Sparks*, 2 App. 112, 127, I said: "The manager of the plaintiffs placed double stamps on the note, and obliterated them of the date of affixing them, but omitted to write either his own initials or those of the bank upon them."

We are of opinion that the cancellation by the cashier of the bank in this case, who wrote on the stamps the date of cancellation, together with his own signature and description of office, was a good cancellation for the purposes of the Act. Nothing so absurd could have been intended by the Legislature as that the bank when a corporation

should, besides writing the date of the cancellation, write its initials and apply its corporate seal. A corporation can only act through and by means of its executive officers or servants. Where the chief executive officer of a banking corporation, double stamping a note, besides writing the date of cancellation, writes his signature followed by his description of office, he does all that can be reasonably asked to effect compliance with the directions of the Legislature, and it is not to be supposed that anything more than reasonable compliance is demanded by the Legislature.

The mode of cancellation by writing date and initials is provided, not only for the purpose of securing evidence as to the time when and the person by whom the cancellation was effected, but that thereby the stamp may be so defaced as to be unfit for any further or other use as a bill or note stamp. The latter is the main object of the Act; the former only the machinery deemed necessary by the Legislature to attain it.

It is next argued that the cancellation was not effected by the Bank "so soon as it acquired knowledge." Ignorance is the excuse for a note not being properly stamped when made. Knowledge removes the excuse so far as the right to sue on the note is concerned. Double stamps make the penalty in that case paid for the ignorance. The validity of the note is the consideration for the double stamping.

It is difficult to imagine any person having a note for several hundred dollars, invalid for the want of stamps, who with a knowledge of the invalidity and a knowledge that the expenditure of a few cents would make it valid, yet refuses the expenditure.

Now the expenditure becomes necessary at the time when the person who, before ignorant, acquires the knowledge, and if not then made cannot afterwards be made. When the ignorance was displaced by knowledge is an enquiry into a matter of fact. If upon the evidence it can be ascertained that knowledge was acquired at any par-

ticular time, at *that* time the privilege of paying double duty arises, and, if not then, cannot afterwards be exercised.

The knowledge intended would appear from the cases to be actual knowledge, and not simply constructive notice: *House v. House*, 24 C. P. 526; *Boyd v. Muir*, 26 C. P. 21; *Curran v. Morgan*, 3 Pugs. 34; *Le Banque Nationale v. Sparks*, 2 App. 116, 120, 132.

The only case which contains any observations to the contrary of this position, is *Waterous v. Montgomery*, 36 U. C. R. 1; but this, although one of the earliest cases on that point, has never been followed in this or any other Province of the Dominion of which we have knowledge.

The learned Chief Justice, however, concluded his judgment in *Waterous v. Montgomery*, 36 U. C. R., at p. 7, as follows: "We think the only reasonable and satisfactory way to carry out this law is, to hold that where reasonable notice of the want of proper stamps is brought to the knowledge of the holder of a note, he must repel, by reasonable evidence, the presumption that he has the knowledge, or shew that as soon as he acquired the knowledge, he affixed the double stamps, or that he made due enquiry, and from that enquiry he was led to believe that the note had been duly stamped; or perhaps it might be sufficient to shew that from his enquiry he had not reason to believe the note had not been duly stamped—in either of which cases he might be justified in not attaching the double stamps until he has knowledge by and at the trial."

These observations fall short of holding constructive notice sufficient, and coincide with the observations of the Chief Justice in *Leonard v. Foshay*, 3 Pugs. 662, 665, decided in 1876. The learned Chief Justice of New Brunswick, said: "I am of opinion the only reasonable and satisfactory way to construe and carry out the law, is to hold that where reasonable notice of the want of proper stamps, or the notes having been stamped at an improper time, is brought to the knowledge of the holder of the note, he must repel, by reasonable evidence, the presumption that he has the knowledge, or shew that, as soon as he acquired the know-

ledge, he affixed double stamps, or that he had made enquiry, and from the information he received he believed the notes had been regularly stamped.

The difficulty in most of the cases is, to decide when the reasonable notice is proved so as therefrom to presume knowledge, or throw upon the holder of the note the duty to repel the presumption of knowledge.

In *House v. House*, 24 C. P. 526, it appeared that the note, dated December, 1872, when made was not stamped, but that afterwards, in July, 1874, the holder of the note called on an attorney, who acted as her legal adviser, and shewed him the note, when he informed her that it should have been stamped, and asked her why this had not been done. The holder stated she did not know it was necessary to do it. The attorney then informed her that in order to make the note valid she must affix double stamps upon it, but the plaintiff misunderstood the instructions given to her, and only affixed two stamps for the single duty. Afterwards, in September, 1874, the holder sent the note to the same attorney, and then, having discovered that only stamps for the single duty had been affixed, he, acting as the holder's agent, affixed the required double stamps and defaced them. This could not have been held a proper stamping of the note if the knowledge of the attorney in July, 1874, was the knowledge of the holder, but was, notwithstanding, it was held to be a good double stamping in September, 1874.

In *Boyd v. Muir*, 26 C. P. 21, it was held that the fact of there being a plea on the record raising the question of the sufficiency of the stamps, is not notice of the insufficiency of the stamps so as to create a knowledge at that time.

In *Curran v. Morgan*, 3 Pugs. 641, decided in 1876, the notes were dated 14th March, 1873, at fifteen and twenty months, made by the defendant in favour of the plaintiff. When the notes were given defendant had no stamps, and desired the plaintiff to put on the stamps. The plaintiff, thinking they were not required on a note of only \$25, did not at the time put on the stamps. After the

notes matured he placed them in the hands of an attorney for collection. The attorney told him double stamps were necessary, and double stamps were then for the first time put on the note. Held, that the note was sufficiently stamped.

In *Le Banque Nationale v. Sparks*, 2 App. 131, Burton, J.A., said: "Now granting that the plea and the formal objection at *nisi prius* were not sufficient to call the holder's notice to the particular defect, so as to fix him with knowledge, upon which I desire to express no opinion, it is clear that upon the argument in term the particular objection was called to the attention of the plaintiffs' counsel, and very shortly afterwards to the plaintiffs themselves. It became necessary for them then to pay the double duty, if they desired to avail themselves of the privilege granted by the 12th section."

The argument for the defence in this case is, that the plaintiffs' attorney when he, in June, 1876, received the notes for collection, either knew or ought to have known then that the stamps were not sufficient: that his knowledge was the knowledge of the plaintiffs; and that it was too late to pay double duty in the following September, when the plaintiffs for the first time received actual knowledge.

We think, notwithstanding the observations to the contrary in *Waterous v. Montgomery*, 36 U. C. R. 1, that the knowledge of the attorney was not under the statute the knowledge of the plaintiffs, and that until the plaintiffs in September received actual knowledge of the insufficiency of the stamps, there was no obligation to pay double duty so as to make valid the notes; and as it was then done promptly, the notes are sufficiently stamped.

"The spirit and intent of the Act," (as said by Gwynne, J., in 1875, in *House v. House*, 24 C. P. 526, at p. 539,) "is to preserve the validity of the note at the cost of the double duty in favour of all holders who, without any intention to violate the law, may have fallen into error or mistake, whether from ignorance of law or of fact, reserving

the liability of the party who ought to have paid the duty, and who did not do so, to the penalty imposed by the statute."

The spirit and intention of the Act, (as said by Welden, J., in 1876, in *Curran v. Morgan*, 3 Pugs. 641, 643, "is to preserve the validity of the notes at the cost of double duty in favour of all holders who, without any intention to violate the law, may have fallen into error or mistake, whether from ignorance of the law or fact."

We are of the same opinion as these learned Judges. We are of opinion that it would be against the spirit and intent not only of the Act, but of the recent decisions in this Province and elsewhere, to give effect to the objections raised here as to the alleged insufficiency of the stamping of the notes.

The result is, that all the objections raised by the defendants to the plaintiffs' recovery, are overruled, and the rule discharged.

Rule discharged.

MILLOY V. KERR ET AL.

Insolvent Act of 1875—Warehouse receipts.

The Canada Car Company had, for some years, been doing business with the Royal Canadian Bank, and with its successor, the Consolidated Bank, and had obtained discounts to the amount of \$23,000 on the security of warehouse receipts given by one C. on 14,000 car wheels and 350 tons of pig iron. When these receipts were given, C. was not in possession of either the goods or the premises on which they were stored. A lease of the premises was subsequently made to him, but he refused to renew the receipts and gave up the property. At the instigation of the Consolidated Bank, to enable the plaintiff to give warehouse receipts, a lease of the premises at the rent of \$5 per month was made to him for a year, and he gave a warehouse receipt to the company for 14,000 car wheels and 350 tons of pig iron, receiving an indemnity from the bank that the property would be forthcoming when required. This receipt was endorsed over to the Standard Bank, by the Car Wheel Company, under the signature of its manager and president, and an advance obtained thereon of \$23,000, which went to pay the Consolidated Bank, who, as it was found, were aware of the Company's insolvency. In February, 1877, an attachment in insolvency issued against the Company, and the defendants, as their assignees in insolvency, took possession of the goods covered by this receipt, claiming them as part of the assets of the estate. The plaintiff then sued the defendants in trespass and trover for the taking.

Held, that defendants were entitled to the goods: that had the Consolidated Bank been assignees of the receipt they would have had no title to the goods, as upon the evidence the receipt would not have been given, as required by the Act, 34 Vic. ch. 5, D., to secure a present advance or debt.

Held, also, that the Standard Bank could be in no better position, for that the evidence, set out below, shewed that the advance by them was not made as an original and independent transaction with the Car Wheel Company, but at the request and for the benefit of the Consolidated Bank, and upon its express or implied guarantee of indemnity.

Held, also, that the lease to the plaintiff was not open to objection as being merely a gratuitous one.

Quære, whether M., as regards the premises leased, could be considered a warehouseman, or the keeper of a yard within that title.

Quære, also, whether there could be a valid legal transfer of the warehouse receipt, except under the corporate seal; but held that this was immaterial, as this objection would not in equity defeat the plaintiff's claim.

Held, that if plaintiff had had a legal title to the goods, he would not be compelled to resort to the Insolvent Court under sec. 125 of the Insolvent Act, but might maintain this action.

DECLARATION. First count: trespass in seizing and converting goods.

Second count: trespass to the close of the plaintiff, and taking and converting goods.

Third count: trover.

Pleas :—

1. To the whole declaration : not guilty, by the Insolvent Act of 1875, 38 Vic. ch. 16, D., and the amending Acts.

2. To the first and second counts : goods not the goods of the plaintiff.

3. To the second count : that the lands and goods are not the plaintiff's.

4. To the second count : that at the time of the alleged trespasses the said land was the freehold and the said goods the property of the defendants as joint official assignees of the estate and effects of the Toronto Car Wheel Company, insolvents within the meaning of, and under the provisions of the Insolvent Act of 1875 and the amending Acts, and the defendants, as such joint official assignees, are entitled to retain the same for the benefit of the said company's estate.

5. To the whole declaration : that the plaintiff's claim and title to the goods and lands are only under and by virtue of an indenture of lease of the said lands for a merely nominal consideration, bearing date the 15th of December, 1876, made by the Toronto Car Wheel Company, the lessors, of the first part, and the plaintiff, the lessee, of the second part ; and also by virtue of a pretended delivery of the said goods by the Toronto Car Wheel Company to the plaintiff as a warehouseman or agent for the said company : that the plaintiff thereupon gave to the company certain paper writings, purporting to be warehouse receipts for the said goods, whereby the plaintiff acknowledged having received of and from the company the said goods for delivery, pursuant to the order of the company, and the company thereupon endorsed the said warehouse receipts to the Standard Bank of Canada, as agents and trustees for the Consolidated Bank of Canada merely, for the purpose of securing a large amount of indebtedness then for a long time due and owing by the company to the last named bank, by which the creditors of the company are injured, obstructed, and delayed. And the defendants aver that at the time of the making of the said

lease and receipts, and of the endorsation of the same to the Consolidated Bank of Canada, the company was a debtor subject to the provisions of the Insolvent Act of 1875 * unable to meet its engagements, and the plaintiff and the Consolidated Bank of Canada knew or had probable cause for believing such inability to exist, and such inability was for a long time theretofore public and notorious * : that, on the 20th of January, 1877, certain of the creditors of the company served it with notice of application for a writ of attachment against its estate and effects under the provisions of the said Act : that such proceedings were thereupon had that, on the 21st of February, 1877, a writ of attachment, by order of the Judge of the County Court of the county of York, duly issued out of the said county, in which county the company had its head office and chief place of business, and such proceedings were thereupon had that, on the 28th of March, 1877, at a meeting of the creditors of the company the defendants were duly appointed and became and are now the joint official assignees of the company's estate under the said Act and for the purposes therein provided : that at the time of the issue and delivery of the writ to the defendants the company were in possession of the said goods and lands, and such possession was transferred to the defendants, who thereupon took possession of the same as part of the property and estate of the company, and as such joint official assignees the defendants became and are now entitled to retain the said lands and goods for the benefit of the company's estate ; and, except as joint official assignees of the company's estate and effects under the said Insolvent Act, the defendants have in no way interfered with the said goods and lands.

6. The same as the fifth plea, down to and including the words and figures " of the Insolvent Act of 1875," at the first asterisk (*) in the margin of that plea. The sixth plea then proceeded as followed :—And that the lease was executed and the said goods so delivered to the plaintiff, and the said receipts so endorsed to the Consolidated Bank of Canada, with intent fraudulently to impede, obstruct, and delay the

creditors of the company in their remedies against it, or with intent to defraud its creditors, or some of them, and the same were so made, done, and intended with the knowledge of the plaintiff and the Consolidated Bank of Canada, and the same had the effect of impeding, obstructing, or delaying the creditors of their remedies, or of injuring them, or some of them. The plea then continued in like manner as in the fifth plea, from the second asterisk in the margin of that plea to the end of it.

7. Like the fifth plea, down nearly to the first asterisk (*) in the margin of that plea. Then it continued:—And the defendants aver that the deposit, pledge, or transfer of the said premises by lease, and the delivery of the said goods, and the endorsation of the said receipts, was made by the company in contemplation of insolvency by way of security for payment to the Consolidated Bank of Canada of a debt then for a long time due and owing to the said bank, whereby the said bank obtained an unjust preference over the other creditors of the company. And the plea continued from the second asterisk in the margin of the fifth plea in like manner as in that plea, to the end of it.

The plaintiff joined issue on the pleas.

Second replication: to so much of the fourth plea to the second count as alleges that at the time of the alleged trespasses the said land was the freehold of the defendants as joint official assignees of the estate and effects of the Toronto Car Wheel Company, the plaintiff says that before the said time when, &c., and before any proceedings in insolvency had been taken, when, &c., the company, by an indenture of lease, duly executed under their corporate seal, demised the said land to the plaintiff to hold to him for one year from the 15th of December, 1876, and then next ensuing, which said demise was then at the said time when, &c., in full force and effect and undetermined, and the plaintiff was in the actual possession of the said land under and by virtue of the said demise.

Rejoinders to the second replication, to the like effect as the 5th, 6th, and 7th pleas, above mentioned. Issue.

The cause was tried before Galt, J., without a jury, at Toronto, at the Summer Assizes of 1877.

The evidence, which was rather lengthy, is, for the purposes of the rule, sufficiently referred to in the judgment of the Court.

At the close of the case the learned Judge said :

" I entertain very great doubt whether the case comes within the 34th Vic. ch. 5, D., as regards the note, or the property included in the so-called warehouse receipt, but for the present I shall hold that it does. I find that at the time when the note mentioned was made the Toronto Car Wheel Company were insolvent, but that the bank was not aware of that fact. I find that the Standard Bank discounted the note on the security of the property covered by the warehouse receipts, and on the recommendation or request of the Consolidated Bank. I find the verdict for plaintiff, damages \$25,790.

" Upon the property being returned, or the Standard Bank satisfied of their claim, the verdict is to be reduced to one shilling."

On the 4th of September last, before Morrison, J., sitting for the full Court, *G. Kerr* obtained a rule, calling on the plaintiff to shew cause why the verdict rendered for him should not be set aside, and a new trial had between the parties, on the following amongst other grounds : 1. The learned Judge who tried the cause refused to allow the witness Stevens to state the facts within his knowledge, shewing that the discount of the Toronto Car Wheel Company's note by the Standard Bank was really discounted for and on behalf of the Consolidated Bank. 2. He refused to allow the witness Brodie to state fully his answer to the question, whether he would have discounted the said note had it not been for the understanding and arrangement he had with the Consolidated Bank. 3. He decided that the witness Clarke need not answer the questions of the defendants' counsel relating to the matters in question, on the ground that the communications made to him were privi-

leged. 4. He found the promissory note in question was a valid note, the same not being under the seal of the Car Wheel Company. 5. He found the warehouse receipt was a valid warehouse receipt, and security on the property in question. 6. He found that the pretended lease of the premises to the company was a valid lease as against the defendants. 7. He should have found that the lease and warehouse receipt and the discount of the note were merely colourable transactions, made and done for the purpose of giving the Consolidated Bank a preference, contrary to the provisions of the Insolvent Act of 1875. 8. The endorsement of the warehouse receipt was invalid, not being under the seal of the company. 9. Under the evidence the verdict should have been for the defendants. Or why a nonsuit or verdict for the defendants should not be entered pursuant to the leave reserved and the statutes in that behalf, for the following amongst other reasons: (a) The action is not maintainable against the defendants, who are the joint assignees under the Insolvent Act of 1875 of the estate and effects of the Toronto Car Wheel Company insolvents; the plaintiff's proper and only remedy is, to obtain an order of the Judge of the County Court of the county of York on summary petition in vacation, or on a rule of the said Court in term, as provided by section 125 of the said Act, and not by suit, &c. (b) It was not proved that the defendants seized and took the plaintiff's goods, or broke and entered the plaintiff's lands. (c) The defendants' fifth, sixth, and seventh pleas, and the first, second, and third rejoinders were proved, and the verdict should have been entered for the defendants thereon. (d) The alleged lease and hypothecation of property by warehouse receipt were *ultra vires*. (e) The company being insolvent could not make a valid lease to the plaintiff for a purely nominal consideration, merely for the purpose of granting warehouse receipts to prefer one creditor, as was proved. (f) The plaintiff could not grant valid warehouse receipts on the property in question under the circumstances of the case, because he was not really the owner or occupier or

lessee of the premises, and he took the said lease and granted the said receipt merely as the agent of the Consolidated Bank, and the receipt was given to secure an antecedent debt. (g) The alleged warehouse receipt is not valid. (h) The Toronto Car Wheel Company did not really obtain an advance of money from the Standard Bank, nor did the said bank advance its money to enable it to carry on its business, because by prior arrangement the money was used to pay off the debt of the Consolidated Bank. (i) The alleged promissory note was not a valid note, the same not being under the seal of the company. (j) The alleged endorsement of the warehouse receipt in question was invalid, the same not being under the seal of the company. (k) The verdict is contrary to law, the evidence, and the weight of evidence, and on the whole case the plaintiff is not entitled to recover, and therefore a nonsuit or verdict for the defendants should be entered.

In Michaelmas term, November 28, 1877, *M. C. Cameron*, Q.C., and *J. K. Kerr*, Q.C., shewed cause. [*Robinson*, Q.C., for the defendants, said he did not rely on the objections 1, 2, 3, & 4, in the rule.] The other objections in the rule are not in any way sustainable. The only real question is, whether the car wheels and pig iron were such property as the bank could take in security, under the Statute of 1871, 34 Vic. ch. 5, D., sec. 46, for a draft which the bank discounted for the company. The case of *Royal Canadian Bank v. Ross*, 40 U. C. R. 466, is an authority for the plaintiff. There the warehouse receipt was given upon coal, stone, and plaster. The Consolidated Bank had been discounting for the Car Wheel Company for several months before the time of the giving of the warehouse receipt now in question, upon which they got the collateral security of warehouse receipts on the same property in dispute. Conger gave the earlier warehouse receipts, and he became alarmed at his responsibility, as he had not the possession of the property he had given receipts for; his place of business being far to the west of where the company's workshops and property were situated adjoining Cherry

street. In November, 1876, a lease was made to him of the ground on which the car wheels and pig iron for which he had given warehouse receipts were situated. Soon after that he refused to renew the warehouse receipts, and he desired to give up the property. Arrangements were then made, and the plaintiff, who was a wharfinger and a warehouseman, accepted a lease of the same property on which the car wheels and pig iron were stored. The Car Wheel Company got a warehouse receipt of these wheels and iron, and Mr. Gartshore, the president of the company, then made arrangements with the Standard Bank, along with Mr. Turnbull, the cashier of the Consolidated Bank, that the Standard Bank should make an advance to the Car Wheel Company on the security of the endorsement of the warehouse receipt which the plaintiff had given or was to give to the Car Wheel Company on the car wheels and pig iron which were stored on the ground which was leased to the plaintiff. The Standard Bank was assured of the sufficiency of the security, and being satisfied with it, they discounted the note of the Car Wheel Company for \$21,000, and they became the indorsees of the warehouse receipt, on the 20th December, 1876. The lease was a valid one, and the property stored there was as much in the plaintiff's possession, who got actual possession of it and exercised acts of control and ownership, as if it had been at his own premises at the foot of Yonge street. The case of *Re Coleman*, 36 U. C. R. 559, shews a lease may be made to a person for the purpose of making him the legal owner of the land, and so authorized to grant receipts for goods which are stored upon it.

Robinson, Q. C., and George Kerr, contra. The Car Wheel Company was insolvent when the transaction took place with the Consolidated Bank, and the bank knew it; and the arrangement with the Standard Bank was one which was made really to secure the payment of the Company's debt to the Consolidated Bank. The Consolidated Bank discounted for the Car Wheel Company on the security of the warehouse receipts, which were given by

Conger as a warehouseman. He had been giving such receipts for about two years without having any lease of the ground upon which the goods receipted were placed. During all that time Conger had not the possession of the land nor of the goods upon it, and his warehouse receipts were of no value. He then got alarmed and would not renew his receipts. The Consolidated Bank having no valid receipts could not then take a receipt which would be any service to them, even after the lease was made to Conger on the 27th of November, 1876, because their claim was then an antecedent debt. It was then the Standard Bank was brought into the transaction. It was thought that if they could be got to advance to the Car Wheel Company the money which that company owed to the Consolidated Bank, that it would be considered to be a discount made by the Standard Bank in the regular course of their banking business, and as a note or debt negotiated or contracted by the Standard Bank at the time they acquired the warehouse receipts by endorsement from the Car Wheel Company. But the real transaction was, that the Standard Bank should help the Consolidated Bank to do that which the latter bank could not do for themselves. The Standard Bank was simply to stand in the place of the Consolidated Bank for the protection of the other bank, to enable it to receive payment in full to the prejudice of the general creditors of the company. The evidence shews, however the transaction may be represented, that the Standard Bank was not entering into a new matter of business solely for itself, or for its own benefit, with the Car Wheel Company. The bargain was made between the two banks. The Consolidated Bank is bound, according to the evidence to indemnify the Standard Bank. It also indemnified the plaintiff that the property for which he gave the warehouse receipts, and which was transferred to the Standard Bank, would be forthcoming whenever it was required; and the solicitors for the Consolidated Bank conducted the whole of that business for the two banks; and Conger's receipt was outstanding when the plaintiff

gave his receipt. It cannot possibly be said in the words of the statute, upon these facts, that the Standard Bank discounted the note for \$21,000, and to secure which they got the transfer of the new warehouse receipt, "in the regular course of its banking business." In the case of *Re Coleman*, 36 U. C. R. 559, the lease was made two years before the insolvency, and was not made for a single transaction. In this case the plaintiff gave nothing but a nominal sum for the lease. It was a *gratuitous* contract within the Insolvent Act of 1875, sec. 130. It was also found that the Standard Bank had no knowledge of the company's insolvent condition at the time the note was discounted, but that becomes of no importance if the fact be that the Standard Bank was acting for and on behalf of the Consolidated Bank, to save and protect it, if it could, because the Consolidated Bank had knowledge of the Car Wheel Company's insolvent condition, and that will avoid the transaction. They referred to *Bump on Bankruptcy*, 9th ed., pp. 808-810, 814-817, 831-834; *Clarke on Insolvency*, 312; *In re Butler*, 4 Bankrupt Register, 303; *Borland v. Phillips*, 2 Dillon 383; *Coates v. Joslin*, 12 Grant 524; *Mathers v. Lynch*, 27 U. C. R. 244; *Newton v. Ontario Bank*, 15 Grant 283; *Davidson v. Ross*, in Appeal, 24 Grant 22; *Todd v. Liverpool and London Globe Ins. Co.*, 20 C. P. 523. The lease to the plaintiff is for one year at \$5 rent for the time, payable at the end of it; and he paid the \$5 when the lease was given to him. The following cases were also referred to: *Royal Canadian Bank v. Miller*, 29 U. C. R. 266; *Paice v. Walker*, L. R. 5 Ex. 173, over-ruled, in *Gadd v. Houghton*, L. R. 1 Ex. D. 357; *Deady v. Goodenough*, 5 C. P. 163, 176; *Glass v. Whitney*, 22 U. C. R. 290-294.

December 28, 1877. WILSON, J.—The plaintiff rests his case upon the fact that the transaction between the Toronto Car Wheel Company and the Standard Bank was an original and independent dealing, in which that bank advanced by discount of the company's promissory note the proceeds of the note at three months for \$21,000, upon

the security of the warehouse receipt which the plaintiff had given to the company, and which the company then endorsed to the bank. And of course the bank also insist that the discount was made in good faith, and without any notice of the company's insolvent condition, if it were insolvent at that time.

The defendants contend the transaction between the Standard Bank and the Car Wheel Company was not an original and independent dealing; but that it was a transaction on the part of the Standard Bank entered into for the benefit and at the request of the Consolidated Bank, and on the guarantee, express or implied, of the Consolidated Bank to give to it a priority over the other creditors of the company, contrary to the Insolvent Act; and that the transaction must therefore be considered just as if the dealing in question had been made direct with and between the Consolidated Bank and the Car Wheel Company.

This statement assumes that the Consolidated Bank could not, if the transaction in question were in fact entered into by and between it and the Car Wheel Company, be maintained against the defendants, the joint assignees in insolvency of the company. And it assumes that the present transaction, if it were made by the Standard Bank for and on behalf of the Consolidated Bank, cannot be maintained against the defendants.

The determination of these questions will probably enable us to dispose of this case.

The defendants, however, insist that, notwithstanding these questions should be answered in favour of the plaintiff, they are still entitled to succeed, because the lease to the plaintiff was invalid under the Insolvent Act, and he had not, either by the lease or otherwise, the possession of the goods in dispute, and had no authority, therefore, to grant the warehouse receipt.

They say also that the plaintiff's remedy, if he has any, should be under section 125 of the Insolvent Act, and not by this action at law.

If I am to begin this case by assuming that the Consolidated Bank could in no way maintain an action against

the defendants, if they had been the endorsees of this warehouse receipt of the plaintiff, and that the right to recover in this action depends altogether upon the fact whether the Standard Bank was dealing truly on its own account or for the benefit of the Consolidated Bank, and if it were dealing for the benefit of the Consolidated Bank, that the action must fail, it will shorten the enquiry considerably.

But am I to assume that the Consolidated Bank could not maintain an action if it were the endorsees of the plaintiff's receipt, and held it upon the promissory notes of the Car Wheel Company, which were paid off by the discount made by the Standard Bank ?

I think I cannot do that. I must first know what the actual state of things was between the Car Wheel Company and the Consolidated Bank; and I have no such knowledge.

All I know is that the company did business with the Royal Canadian Bank, while that bank carried on business, and that the Royal Canadian Bank was, in May 1876, converted into, or transferred to, the Consolidated Bank, and that the company continued to do business with that bank until the account was closed by the discount which the company obtained from the Standard Bank. What the origin of that dealing was, or upon what terms it was carried on, we have no information. There were a number of warehouse receipts given by Mr. Conger to the company, which were put in at the trial as the warehouse receipts upon which the Royal Canadian Bank and its successor, the Consolidated Bank, made their discounts to the Car Wheel Company. They are as follows: 1876, February 22nd, 900 car wheels; February 22nd, 900 car wheels; May 22nd, 900 car wheels; June 28th, 350 tons pig iron; July 8th, 350 tons pig iron; July 15th, 500 car wheels; July 19th, 500 car wheels; August 28th, 900 car wheels; October 2nd, 350 tons pig iron; October 18th, 500 car wheels.

There is no explanation upon or for what consideration it was that any one of these receipts was given, nor what the amount of that consideration was, nor whether the giving of

these receipts began at the time when the advances were first made, or after they had begun to be made. If the receipts began to be given after the advances were made, were those advances afterwards paid off or reduced; and if reduced, to what amount? That may be important to be known, because the subsequent dealings of the parties might shew at some intermediate time the old debt was paid off, so that when the next discount was made and the receipt given for it in security, that might be the beginning in effect of a new dealing or advance.

It may be also there was an agreement between the Royal Canadian Bank and the company at the beginning of their dealings, that the company should furnish security at all times to the bank, sufficient to cover the advances or discounts which were made, and that the receipts, although given after the advances or after parts of them were made, were given in pursuance of that agreement.

It may be that the amalgamation of the Royal Canadian Bank and the City Bank, and their joint incorporation under the name of the Consolidated Bank of Canada, by the 39 Vic. ch. 44, D., did not make the former debt of the Car Wheel Company to the Royal Canadian Bank a new debt contracted, or a discount newly made by the Car Wheel Company with the Consolidated Bank. It was not discussed, and I mention it more to shew it has not passed unobserved than to shew it can prevail in favour of the bank.

I do not know what the amount of the company's debt with the Royal Canadian Bank was on the 22nd of February, 1876, or whether the debt was then first contracted; nor do I know whether the two receipts of the 22nd of February, 1876, were on two different sets of wheels or on the same 900 car wheels. I presume the latter, because on the 22nd May there is only one receipt for 900 car wheels. Nor whether the two receipts of the 28th June and 8th of July are on the same 350 tons of pig iron, or on different quantities. And there are other matters of this kind about the other receipts which might require to be

explained. The Consolidated Bank, I assume, relied on the receipts of the 28th of August for 900 car wheels, and of the 18th of October for 500 car wheels, and of the 28th of October for 350 tons of pig iron, as the extent of their security, because the receipt which the plaintiff gave in December was for 1400 car wheels and 350 tons of pig iron.

If there is anything of consequence to the parties in these observations they may have to be considered hereafter.

At present I will assume that in December last, when the Consolidated Bank held Mr. Conger's receipts for the 1400 car wheels and for the 350 tons of pig iron, they held them, not for advances then made to or for a debt originally contracted by the Car Wheel Company with the bank, nor for advances originally made by, nor for a debt originally contracted with, the bank upon warehouse receipts which the latter receipts afterwards represented; and I will assume also that the advances so made and the debt so contracted were made and contracted without any agreement or "understanding that such receipt would be transferred to the bank."

The first question then is, whether the Consolidated Bank could have maintained this action if it had been the assignee of the warehouse receipt which was given by the plaintiff.

The answer must certainly, on the assumptions just stated, be determined on the statute against the bank, because the statute requires that the transfer of the receipt shall be given upon a present advance or debt, or upon an advance or debt for or in respect of which there was an "understanding that such receipt would be transferred to the bank." If therefore the Standard Bank dealt with the Car Wheel Company for and on behalf of the Consolidated Bank, as agent, trustee, or otherwise, to secure or to try to secure to it a preference over the other creditors of the Car Wheel Company, and is to be indemnified by the Consolidated Bank by any agreement or understanding, express or implied, for their so dealing; if in fact it is not a true, *bonâ*

fide, and independent dealing of the Standard Bank with the Car Wheel Company, it must follow that the Standard Bank can stand in no better situation in this action than the Consolidated Bank, who, in such case, would be the real parties and principals.

The next and serious question is, whether the Standard Bank dealt in the transaction in question for itself, or for or on behalf of the Consolidated Bank?

That depends upon the evidence of what took place between Mr. Gartshore, Mr. Turnbull, and Mr. Brodie, and of some other facts and circumstances.

Mr. Turnbull, for the Consolidated Bank, said: "We went to Mr. Brodie and told him the Car Wheel Company wanted to raise money. We did not tell him for what purpose. They would be prepared to give Mr. Milloy's warehouse receipts. We told him the security would be good to our own knowledge, and there was ample margin, and requested him to make the discount, which he did. * * We did not say anything about seeing them harmless; that was *not* understood between us." Q. "When one bank comes to another and recommends them to make a discount, is it not understood between them the one will see the other all right"? A. "It would be certainly understood after the representation I made as to the nature of the security, that we should see they did not lose by it. I have not considered this as a matter of our own all along."

Mr Brodie said: "I am cashier of the Standard Bank. It was Mr. Turnbull called to see me. He asked me if I was open to take up a transaction which they would recommend. I said I would see. He stated the nature of the security." Then he said, after consulting the president and vice-president, "and estimating the value of the securities, as we had a friendly feeling to the Consolidated Bank, and they asked us to take it up, we, finding the security ample, took it up. * * When a bank recommends to another there would be an honourable understanding I think, to the effect not to allow them to suffer loss. The securities were recommended as perfectly good by the Consolidated

Bank. We loaned the money in the usual way. Very likely I knew the Car Wheel Company kept their account with the Consolidated Bank. Mr. Turnbull made no representation to me that he wished me to do this as a convenience to them, but I may have inferred so."

Q. "Were you to stand in the place of the Consolidated Bank"?

A. "I don't know that. I did it at the request of the Consolidated Bank, but I did it only because I was satisfied the security was good."

Mr. Gartshore said: "Mr. Turnbull and I arranged to raise money to take up our paper as it became due at the Consolidated Bank, by giving the lease and issuing the receipt. Mr. Turnbull suggested my going to the Standard Bank. It was to get the money put through there I suppose. I did not have to go to the Standard Bank. Mr. Turnbull told me I could get the discount there. I suppose he wanted to have a new transaction."

The plaintiff said: "When I took that lease I got a letter of guarantee from the Consolidated Bank guaranteeing the property being there and being forthcoming. That is the letter I got, dated the 20th December, 1876. As a warehouseman, I do not remember ever taking such a guarantee before that." [In his examination he said he got it because the goods were so far away, and that he got the letter from the Car Wheel Company.] * * I had some conversation with Mr. McCracken about the institution of this suit. He told me that I would have to fight the matter. I think he asked me who my solicitors were, and I told him. He said you had better go and employ them to fight the matter. I do not think he gave me to understand anything in particular about the costs. My impression was, I would not have to pay the costs,—that if I came to any damage they would be responsible. It is only right they should be. In my examination I said I considered the Consolidated Bank responsible to me, and I say so now.

The guarantee of the Consolidated Bank is dated the 20th December, 1876, the same day as the note and the

warehouse receipt. The whole of the transaction, that is, the taking of the lease by Milloy, his giving the warehouse receipt, and advising the Consolidated Bank and the Car Weel Company, and carrying out the arrangement come to between the two banks, was done by the solicitors of the Consolidated Bank. The charges begin on the 21st of November, 1876, and end on the 16th of January. There are only \$4 charged after the 21st of December, when the surrender of lease was drawn.

It appears that only \$9,000 was due of the Consolidated Bank debt when the arrangement was made.

It is not a usual course of business for one bank to go to another bank to raise money for a person who wants to get a loan, unless the bank applying for it has some interest in the person who wants the loan. The bank would lend the money itself, as a rule, without handing over the transaction, if it were a good one, to another bank ; and if, for any reason, it did not lend the money, that reason would probably be mentioned by the one bank to the bank to which it referred.

The Consolidated Bank desired to close the account it had with the Car Wheel Company. It was desirable for some reason that a new arrangement should be entered into by the company with some other body or person willing to advance the sum of \$21,000 to that company.

Mr. Turnbull, for the Consolidated Bank, which was to get the money if it were raised, saw Mr. Brodie of the Standard Bank, and he, after advising with the president and vice-president of his bank, and on estimating the value of the security which was offered, agreed to advance the money to the company without ever asking what the money was wanted for, and without being told how it was to be applied. Mr. Turnbull's inducements were, "We told him the security would be good to our own knowlege, and there was ample margin;" and again, he did not tell Mr. Brodie that he would be indemnified, but "it would certainly be understood, after the representation I made as to the nature of the security, that we should see they did not lose by it."

Mr. Brodie, for the Standard Bank, said : " When a bank recommends to another there would be an honourable understanding I think to the effect not to allow them to suffer loss. The securities were recommended as perfectly good by the Consolidated Bank." And he also said he may have inferred that Mr. Turnbull wished him to make this advance as a convenience to the Consolidated Bank, although he did not say so, and when asked if he was to stand in the place of the Consolidated Bank, his answer was, " I don't know that,"—a singular answer, if he were not to stand in its place. And he continued, " I did it at the request of the Consolidated Bank ; but I did it only because I was satisfied the security was good."

I should infer from that evidence that the advance was made by the Standard Bank for the accommodation and convenience of the Consolidated Bank, and that will account for the Standard Bank making no enquiry as to the purpose for which the advance was wanted, nor for any particulars as to how it was to be applied, nor as to the financial condition of the Car Wheel Company at that time, nor as to their means or ability to pay so large a sum on a three months credit.

If it had not been a bank which applied for the favour to the Standard Bank, it is quite improbable that it would have been granted without the minutest enquiries being first made into the condition, prospects, business, and assets of the Car Wheel Company. But a bank would not even on the request of another bank, and on their assurance that the security was good, advance so large a sum to another without being first satisfied that the transaction was a safe and prudent one, unless indeed the bank making the request became expressly or by necessary implication responsible to the bank which advanced the money for the advance so made. If such an assurance of indemnity by words or otherwise were given, then indeed the bank which made the loan would rest satisfied without taking any trouble about the condition of its new customer ; and that I infer to have been the state of things between these two banks.

I am strengthened in that opinion by the facts that it was the Consolidated Bank which got the plaintiff substituted for Mr. Conger as the warehouseman to give the warehouse receipts, and which got the lease made to him, and which got the warehouse receipt to be granted by the plaintiff by indemnifying him for it, and which directed the plaintiff to bring this suit, and, as he says, at their expense. The Standard Bank interfered in no way in any of these proceedings, nor has it interfered with this suit.

If my conclusion be a correct one, and I think it is, then the advance which the Standard Bank made to the Company is to be considered just as if it had been made by the Consolidated Bank, and, in that case, if they had made it, the receipt of the plaintiff would (on the assumption before specially mentioned) have been taken by them not for a new but for a past debt, and so not within the statute, and the plaintiff would fail in this action.

The case of *Borland v. Phillips*, 2 Dillon 383, has some application here. The defendants, private bankers at Fort Scott, received from the bankrupts, also private bankers at the same place, after the latter had closed their doors for general business, a draft on New York *for collection*. On being advised by their correspondent in New York of its payment there, they paid the full amount of the draft to one of the bankrupts. Held, if the payment to the bankrupt was made in good faith, without reasonable cause on the part of the defendants to believe that the bankrupts intended to make therewith any fraudulent payment or preference, that the defendants were not liable to the assignees in bankruptcy under the 35th sec. of the statute.

The case of *In re Butler*, 4 Bankrupt Register, U. S. District Court, Mass. 302, has a strong bearing upon this case. There Butler, the debtor, owed Mr. Cushman \$1,586 on a note for goods sold about two years before the transaction which was impeached, on which small payments had been made from time to time. Cushman asked for payment, and Butler said he could not make it unless he could borrow the money. Kimball, a clerk or partner of Cush-

man, then suggested to Mendell, the petitioner, that he might invest his money to advantage on a mortgage of Butler's stock, and to Butler that the petitioner would probably lend him the money. He brought the parties together, and the petitioner agreed to lend Butler \$1,600. The mortgage was given in July, 1870, and the money lent in Cushman's place of business, and Kimball lent the petitioner \$600 to make up the sum. Butler paid over the money to Cushman in settlement of the old note, but the payment was not shewn to have been made in the presence of the petitioner, or that in fact he was fully informed of the nature of the transaction. He made no enquiry into the standing or condition of Butler's affairs, but relied mainly on the security on the advice of Cushman and Kimball. Butler's stock was attached about two weeks after.

The Court said: "Upon the evidence it is plain that the money was raised for the express purpose of paying a pre-existing debt, and the intent to prefer the creditor may be fairly inferred. The only doubt is, whether the mortgagee, the petitioner, was a party to the fraud upon the statute or was kept in the dark by his friends. There is evidence from which it may be argued that he must have understood the scheme unless he were wilfully blind; but the assignee relies on sec. 35 as imposing such knowledge upon him by operation of law unless he made diligent enquiry. The precise point of law in this case is, whether a person advancing money to a trader and taking security from him out of the ordinary course of business, is to be held liable to reconvey the security if the only fraud intended by the debtor is the payment of a creditor by way of preference. It is possible the petitioner was hoodwinked by the others, though the *prima facie* evidence is against him; and is not met, and I do not believe the truth to be so. The petition was thereupon dismissed.

The case of *Coates v. Joslin*, 12 Grant 524, is also in favour of the defendants.

When Mr. Brodie was asked: "Were you to stand in the

place of the Consolidated Bank towards the Car Company?" and he answered, "I don't know that; I did it at the request of the Consolidated Bank, but I did it only because I was satisfied the security was good," in place of saying, if the fact were so, that the Standard Bank was not to stand in the place of the Consolidated Bank towards the Car Company, but that he was making a new and independent agreement solely on behalf of the Standard Bank, he shewed that he knew the Consolidated Bank was the party to be accommodated, and benefited by the proposed arrangement, and that he knew he was just to take its place towards the Car Company; or, at any rate, he shewed he was doubtful whether or not that was what he was to do; and when he said he *inferred* the arrangement was for the convenience of the Consolidated Bank, although Mr. Turnbull made no representation to that effect, that statement is just a corroboration of the fact that he must have known it was for the accommodation of the bank; or that he believed it, but he did not care to enquire too particularly into it.

In *Dixon v. Muckleston*, L. R. 8 Ch. 155, the Lord Chancellor said, at p. 160: "There may be omission or negligence equivalent in practical effect to acts; because when there is something which a person ought to do and must be presumed to know that he ought to do, but does not do, the consequence is that the omission may be regarded as due to what is called gross or wilful negligence, which is equivalent to an act."

I refer also to *Maxwell v. Burton*, L. R. 17 Eq. 15, and under what state of circumstances fraud or gross and wilful negligence will be imputed to a party; and to the case of *Hewitt v. Loosemore*, 9 Hare 449.

I do not give any weight to the argument that the lease given to the plaintiff is a voluntary lease, because I do not think it was so. The amount of rent, only \$5, shews that so small a sum was not the value of the premises. But the lease was not made as a beneficial lease, that is as one from or out of which the tenant was to make a profit; nor

was it a lease which was any disadvantage to the Car Wheel Company. The true consideration for the making of the lease was not the \$5 rent, but that the plaintiff might have the legal title for the term vested in him in order that he might, for the benefit and accommodation of the Car Wheel Company, be able to give a receipt to them for the goods which were stored upon it, and in order that he might have an independent control over the goods which he so receipted.

That cannot be said to have been a gratuitous lease or contract. It was a very beneficial one to and for the company, and if it cannot be impeached upon other grounds, it cannot, in my opinion, be held to be invalid because it is gratuitous.

Nor do I see any reason for avoiding the lease because it was made for the purpose of giving the plaintiff the rights of a tenant and warehouseman over the land demised, and of enabling him to store goods upon it, and to grant warehouse receipts in respect of such goods, even although it was made to meet or to effectuate a single transaction. Of course I am considering the matter as free from all fraud or improper dealing, and as honestly meant as it was honestly acted upon.

What is there to prevent a warehouseman taking, in addition to his ordinary place of business, a lease of land for the purpose of storing heavy goods upon it which cannot conveniently or without much expense be put upon his ordinary premises, or for the purpose of taking in store goods already upon such newly acquired land, because it would be too expensive to remove them to his own general business place? I cannot see any objection to it in law, nor can I conceive that it is against any rule of commerce or of fair dealing.

It was also argued that the endorsement of the warehouse receipt was void because it was not made under the corporate seal of the company, but by the signature of the manager and president of the company in the name of the company.

It is a sufficient answer to such an objection to say that the assignee in insolvency can take only such property of the debtor to which the debtor has both an equitable and a legal title, and as equity would not regard the absence of a seal, the title of the plaintiff or of the Standard Bank could not be impeached for that cause.

I doubt whether the transfer of the receipt can be valid at law when made by a corporate body, not under the common seal of the corporation. It is a document which is transferable only for the special purpose mentioned in the statute. The Consol. Stat. C. ch. 54, sec. 8, and the 31 Vic. ch. 11, sec. 7, D., speak of the receipt, &c., being *endorsed* to the bank. The 34 Vic. ch. 5, sec. 46, D., speaks of the bank acquiring or holding any such receipt, &c., but it does not say whether that is to be by endorsement or otherwise.

There is a good deal to be said on the subject, and many cases bearing upon it, which it would be necessary to consider before determining, but, in my opinion, it is not necessary to do so for the reason before given. The infirmity, if it be one, does not affect the plaintiff's title, but only that of his *cestui que trust*, and that in a matter which is not deemed an essential in a Court of equity.

If the plaintiff has a legal title, good as against the defendants, they were not obliged by reason of their actual possession of the goods which would, in that case, have been wrongfully taken from his custody by the defendants, be compelled to resort to the Insolvent Court for his remedy, under section 125 of the Act.

I am of opinion, for the reason before given, that the plaintiff is not entitled to recover, assuming, as I have before said, that the title of the Consolidated Bank, which the Standard Bank represents, is to be determined upon the evidence now before us, and cannot be bettered by any further evidence. If it can be, there should be another trial directed for that purpose. (a)

(a) The plaintiff declined to take a new trial on payment of costs, which the Court offered to give; and as Mr. Justice Morrison had left the Court and been replaced by Mr. Justice Armour, a re-argument was directed.

In Hilary term, February 16, 1878, *M. C. Cameron*, Q. C., and *J. K. Kerr*, Q. C., argued the case for the plaintiff.

Robinson, Q. C., and *G. Kerr* for the defendants.

March 15, 1878. WILSON, J.—There was not, in my opinion, anything further said than had been said before, and I remain of the same opinion I had before formed, that the rule should be made absolute to enter a verdict for the defendants.

HARRISON, C. J., concurred.

ARMOUR, J., concurred, and expressed great doubt as to whether Milloy *quoad* the ground where the property mentioned in the receipt was, was a warehouseman or keeper of a yard.

Rule absolute.

FREY V. THE MUTUAL FIRE INSURANCE COMPANY OF
THE COUNTY OF WELLINGTON.

Fire insurance—Arson—New trial—Statutory conditions—Premium note—Assignment—Notice—36 Vic. ch. 44, sec. 32, O., 39 Vic. ch. 24, O.

Where, in an action on a fire insurance policy, the jury find against the defendants on a plea of arson, the Court will not, in its discretion, grant a new trial, unless the evidence so preponderates in favour of the truth of the charge as to evince, as it were, a determination on the part of the jury not to give effect to the law.

A resolution was passed by the defendants, a Mutual Insurance Company, for an assessment for the year "on policies in force during the whole or any part of the year ending 31st December, 1876," not stating in words that it was on the premium notes of such policies, but it appeared that the assessment was in fact on such premium notes, and was based on a scale of rates varying according to the period of the year when the policy was taken. The rate on this policy was three per cent., but in the only notice proved the rate charged was six per cent.

Held, that the assessment was valid, but the notice insufficient; and that the nonpayment of such assessment therefore formed no defence.

Held, also, that an insurance company cannot set up *against the insured* statutory conditions contained in the schedule to 39 Vic. ch. 24, O., unless such conditions are printed on the policy as directed by the Act. The company, therefore, were not allowed to set up one of these conditions, No. 10 (g), exempting the defendants from liability where more than five gallons of coal oil are kept on the insured premises without their permission.

Held, that where there are conditions on the policy, other than the statutory conditions, which are not printed thereon, the policy *as against the insured* must be read as if without conditions. *Held*, therefore, that the company could not set up a condition on the policy which provided that the loss should not be deemed payable until three months after the receipt of the proofs of loss.

No. 16 of the statutory conditions, provided that the loss should not be payable until thirty days after completion of the proofs, unless otherwise provided by statute or the agreement of the parties: and it was argued that the contrary was here provided both by statute and agreement; but *held*, otherwise, the statutory conditions not being printed on the policy.

Under the terms of this policy, a mutual insurance one, the losses were only to be paid within three months after due notice given by the insured according to the provisions of the Act, 36 Vic. ch. 44, sec. 52, O., relating to Mutual Insurance Companies.

Held, this defence could not be set up, for 1, There was no plea framed under that section; and 2, The operation of the section depended on the policy calling for proof of loss, which this policy did not do.

ACTION on a policy of insurance against fire, dated 11th October, 1876, commencing at noon on the 26th September, 1876, and ending at noon on the 26th September, 1879, to the amount of \$2,000, on the property of the insured, that is to say, his goods in store on lot 4, Hastings' survey, south side of King street, in the village of Crosshill.

The declaration, after setting out the policy, contained an averment that the policy was made and issued after the passing and coming into force of the Fire Insurance Act of 1876, and was subject to the enactments and provisions of the said Act, and, as against the defendants, to the statutory conditions set forth in the schedule to the said Act, without any variations and additions; and, as against the plaintiff, the said policy was not subject to the statutory conditions, or any other conditions, and the statutory conditions could not be deemed a part of the policy as against the plaintiff, because the statutory conditions set forth in the said schedule were not printed on the said policy as required by the said Act.

The declaration then averred a loss by fire on the 20th of May, 1877, to the amount of \$1,300: that the plaintiff was interested in the loss, and forthwith after the fire, that is to say, on the 22nd of May, 1877, the plaintiff, pursuant to No. 12 of the statutory conditions, gave notice in writing of the fire, loss and damage to the defendants; and thereafter, and before the commencement of this action, and as soon after the loss as practicable, the plaintiff delivered to the defendants certain statements and accounts of his said loss, which statements and accounts the plaintiff believed to be a sufficient compliance with the conditions, if any there be, of the said policy; and subsequently, on 3rd of July, 1877, having been informed by the defendants that the statements and accounts were not by them considered to be sufficient, the plaintiff delivered to the defendants as particular an account of his loss as the nature of the case would permit, and then furnished to the defendants all the accounts and certificates required by the conditions, if any, on the policy; and that if the conditions, if any, on the policy as to the proof to be given to the defendants of the occurrence of the fire should be held to be binding on him and not to have been strictly complied with, it was by mistake of the plaintiff, and not otherwise, that such last mentioned conditions have not been complied with: that the various statements or proofs of loss were given in good

faith by or on behalf of the plaintiff; and that the defendants did not, in any manner, within a reasonable time, or at any time after receiving such statements or proofs, notify the plaintiff in writing that such statements or proofs were objected to, and what were the particulars, if any, in which the same were alleged to be defective: that the defendants' board of directors, at a meeting held on the 4th of July, 1877, by a resolution of the board duly issued, expressly refused to pay the claim of the plaintiff, without giving in such resolution any reason for such refusal; and, save as aforesaid, all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to receive and be paid the amount of his loss and damage, yet defendants have not paid the same.

The defendants pleaded several pleas.

The first denied the policy, and the second the loss.

The third denied the giving of due notice, the delivery of statements and accounts of his loss, the delivery of a particular account as required by the conditions of the policy, and concluded as follows: "The defendants further say, that the plaintiff's non-compliance with the conditions of the policy was not by mistake of the plaintiff, and the defendants traverse all allegations made for the purpose of relieving or excusing the non-compliance with the statutory conditions in respect of proof of the alleged loss.

The fourth plea was a simple traverse of the delivery of a particular account of the loss as required by the conditions of the policy.

The fifth plea alleged that the policy was made and issued subject to a condition that the loss should not be payable until three months after the receipt by the defendants of the proofs of such loss, to be furnished by the plaintiff to the defendants; and averred the delivery of the proofs on the 3rd of July, 1877, and that less than three months elapsed before the commencement of this suit.

The sixth plea alleged that the defendants were a mutual insurance company, incorporated under the laws of the

Province, in force in the Province of Ontario, relating to Mutual Insurance Companies; and that the policy was issued to the plaintiff as a member of the defendants' company, and contained a number of conditions which it set out in words, and including among them the condition as to the three months for payment after proof of loss; and concluded by an averment that the action was brought before the expiry of the said period of three months.

The seventh plea, after averring that the defendants' were a mutual insurance company as in the previous plea alleged, and that the plaintiff was a member of the defendants' company, alleged the giving by plaintiff of a premium or deposit note to the defendants for the insurance, an assessment before the loss of \$12 on the premium note, notice of the assessment to the plaintiff on the 12th of February, 1877, that such assessment became payable in thirty days after notice mailed to the plaintiff, non-payment within the thirty days, both of which periods elapsed before the loss, nor did the plaintiff at any time pay the said assessment, whereby and by force of the statute in that behalf the policy became and was null and void.

The eighth plea was arson.

The ninth plea averred that at the time of the loss there was stored and kept by the plaintiff, without the permission in writing of the defendants, in the building containing the property assured a much greater quantity than five gallons of coal oil, contrary to a condition printed on the policy pursuant to the statute in that behalf.

The plaintiff took issue on all the pleas of the defendants

The action was tried before Morrison, J., and a jury, at the last Fall Assizes for the county of Waterloo.

The application for the insurance was made on the 26th of September, 1876, was in writing, and described the applicant as "Jacob Frey, of Crosshill, in the county of Waterloo."

There was a post office at Crosshill, and there was nothing to shew on the face of the application that the applicant had any other post office than Crosshill post office.

The application had at the head of it the words: "Renewal policy No. 8104, dated 26th of September, 1873."

The policy was issued on the 11th of October, 1876, and was as described in the declaration, and in consideration of the deposit by the plaintiff with the defendants of a premium note for \$200.

There were twenty-two conditions endorsed on it, but these were not the statutable conditions or variations of statutable conditions made necessary by 39 Vic. ch. 24, O., which took effect on the 1st of July, 1876.

On the 27th of December, 1876, the directors of the defendants levied a scale of rates "on policies in force during the whole or any part of the year ending the 31st of December, 1876," and not in words "on the premium notes" of such policies.

They provided that policies in force for the whole year were to be assessed at six per cent. A similar per centage was imposed on policies taken between the 1st of January and the 27th of July. A rate of only four per cent. was imposed on policies taken between the 27th of July and the 8th of September. And a still less rate (three per cent.) on policies issued between the 8th of September and the 18th of October.

Notice in writing of this rate was said to have been sent in February, 1877, to all policy-holders affected, including the plaintiff, but the plaintiff denied that he received the notice.

It was not shewn that the notice had been mailed to the plaintiff at Crosshill post office. It rather appeared that the notice was mailed to him, addressed to St. Clemens post office.

The notice, according to the copy put in at the trial, apprized the plaintiff that he was called upon to pay six per cent. assessed on his premium notes, and amounting to \$18.00 on policies Nos. 8879 and 10362.

The policy sued on was No. 10362. It was said that the plaintiff had effected the prior policy No. 8879 on the building for \$1000, but it was not proved and the date of it was not shewn.

The notice, although dated February, 1877, required payment of the rate at the office of Mr. A. Casey, New Hamburg, on 24th February, 1877.

Mr. Casey swore that in April, 1877, he spoke to the plaintiff about the assessment, and asked for payment, but this was denied by the plaintiff.

The fire took place about ten o'clock on the night of 21st May, 1877.

There were many circumstances attending the fire which were suspicious.

The plaintiff before and at the time of the fire was much involved in debt, business was dull, and he had been heard to say that rather than give up the place he would reduce it to ashes.

Shortly before the fire was discovered, it was proved that the plaintiff and another person had been seen leaving the place, but this was explained by the plaintiff and the person who was in his company.

The plaintiff admitted that he had been at the place shortly before the fire for a lawful purpose which he described, and left a lamp burning, which he supposed had burst and caused the fire.

There was evidence that the plaintiff kept more than five gallons of coal oil on the premises, that the smoke was dense and black, and that the fire spread very rapidly.

On the day after the fire the plaintiff notified the defendants of his loss, and they sent a person to assist him to take stock in order, if possible, to arrive at the amount of the loss.

The plaintiff, in June, 1877, by his solicitors made a demand upon the company for the payment of his loss, but this was, by letter, dated 6th June, 1877, signed by the secretary of the company, refused :

1. Because of the non-payment of the assessment.
2. Because the circumstances attending the fire were such as to lead the company to the belief that the fire was not accidental.

The solicitors of the plaintiff, by letter, dated 26th June,

1877, insisted upon payment in accordance with the proof papers previously sent by the plaintiff.

The defendants, by letter, dated 29th June, 1877, signed by their secretary, denied that any proof papers had been received, and intimated that if the plaintiff supposed he had any claim "he had better send in the papers," so that they might be submitted to the board of directors, which would meet on the following Wednesday.

The necessary proof papers were thereupon furnished by the plaintiff to the secretary of the company on the 2nd of July, 1877.

The secretary of the company, by letter, dated the 13th of July, 1877, informed the solicitors of the plaintiff that the proof papers had been submitted to the board of directors at their meeting on the 4th of July, 1877, when, after being duly examined, "it was moved, seconded, and resolved that the said claim be not paid."

The writ in this action was thereupon issued on the 23rd of August, 1877.

The learned Judge in his charge drew the attention of the jury to the various issues, and told them that the principal issues for their decision were those raised by the seventh, eighth, and ninth pleas. He asked the jury, whatever their finding might be, to assess the damages, except in the event of their finding the plaintiff guilty of arson. He thought the plaintiff was entitled to a verdict on all the issues except the three mentioned. He submitted to the jury three questions, which with their answers are subjoined :

1. Was the place wilfully set fire to by the plaintiff?

Ans. *No.*

2. Was the notice of the assessment mailed to the plaintiff's proper address? Ans. *Yes.*

3. Was there more than five gallons of coal oil kept by the plaintiff on the premises at the time of the fire? Ans. *Yes.*

They assessed the plaintiff's damages at \$700.

The learned Judge thereupon entered a verdict for the

plaintiff and \$700 damages on the first six issues, and on the eighth issue ; and for the defendants on the seventh and ninth issues, reserving leave to the defendants to move to enter the verdict for them on the fifth and sixth issues, and also reserving leave to the plaintiff to move to enter the verdict for him on the seventh and ninth issues.

In Michaelmas Term, November 21, 1877, cross rules were obtained.

Guthrie, Q.C., for the defendants, obtained a rule calling on the plaintiff to shew cause why the verdict entered for the plaintiff, as to the fifth and sixth pleas, should not be set aside and a verdict entered for the defendants on the said pleas or either of them, pursuant to leave reserved ; or to set aside the verdict on the eighth plea, and for a new trial, on the ground that the verdict was against the evidence and the weight of evidence and the charge of the learned Judge who tried the action.

W. H. Bowlby, for the plaintiff, obtained a rule calling on the defendants to shew cause why the verdict for the defendants on the seventh and ninth issues should not be set aside, and entered for the plaintiff, pursuant to leave reserved at the trial, or why the verdict should not be set aside and a new trial had between the parties, on the grounds that no valid assessment was proved at the trial: that by the resolution of the defendants' board making the assessment only three per cent. was declared upon the policy declared on (which was dated after the 8th of September, 1876), while the notice of assessment demanded six per cent., and the notice made the assessment due about fourteen days after it was mailed, instead of thirty days as required by the statute, and made it payable at New Hamburg without authority from the directors or the plaintiff ; and said resolution erroneously directed the assessment to be made on the sums insured instead of upon the premium notes, and there was no condition such as set forth in the ninth plea printed upon the policy as alleged in that plea, the same not having been printed on such policy under the heading

“Statutory conditions” pursuant to “the Fire Insurance Policy Act, 1876,” and the said policy was not, as against the plaintiff, subject to the statutory condition pleaded in the ninth plea.

During the same term, December 5, 1877, both rules were argued together.

M. C. Cameron, Q.C., and *W. H. Bowlby*, shewed cause to the defendants’ rule and supported the plaintiff’s. The policy was issued after 39 Vic. ch. 24, O., without having endorsed upon it the statutable conditions as directed by that Act, and must be, as against the plaintiff, read as a policy without conditions, in which event the verdict for the plaintiff is rightly entered for the plaintiff on the fifth and sixth issues, and ought to be entered for the plaintiff on the ninth issue. The plaintiff is entitled to the verdict on the seventh issue, because the assessment could only have been three per cent. on plaintiff’s premium note, and no proper notice of that was sent to him as the statute directs. It is not usual to grant a new trial where the plea is arson, and the verdict is against the plea, and no new trial should be granted on that ground in this case.

Robinson, Q. C., and *Guthrie*, Q. C., contra. The policy should be deemed and taken as if containing the statutory conditions, and among these will be found one, No. 10 (g), against having more than five gallons of coal oil on the premises, and this entitles the defendants to the verdict on the ninth plea. The assessment was valid. The insurance was in force for the whole year, but the policy was a second policy on the same risk. It was sufficiently notified to the plaintiff. But under any circumstances the defendants are entitled to a verdict on the fifth and sixth pleas, for these are good pleas under the Stat. 36 Vic. ch. 46, sec. 52, O., independently of the conditions endorsed on the policy. There should be a new trial on the plea of arson. They cited the following cases: *Gould v. British America Ins. Co.*, 27 U. C. R. 473; *Hatton v. The Provincial Ins. Co.*, 7 C. P. 555; *Green v. The Beaver and Toronto Mutual Fire Ins. Co.*, 34 U. C. R. 78; *Abrahams v. The Agricul-*

tural Mutual Ass. Association, 40 U. C. R 175; *Smith v. The Mutual Ins. Co. of Clinton*, 27 C. P. 441, 444; *Lyons v. The Globe Mutual Ins. Co.*, 27 C. P. 567, 28 C. P. 62.

March 15, 1878. HARRISON, C. J., delivered the judgment of the Court.

We were much pressed during the argument by counsel for the defendants to make absolute the rule for a new trial on the plea of arson.

After some consideration, we offered to make the rule absolute for a new trial on terms which, after last Michaelmas term, were communicated to the defendants, but which they are unable to accept.

We must now decide whether we ought to do so, on the ground that the verdict is contrary to evidence and the weight of evidence.

The charge of arson made against the plaintiff is not only one involving much moral turpitude, but one which if true may be followed by serious punitive consequences.

If Lord Kenyon was right in his view of the law in *Cook v. Field*, 3 Esp. 133, 134, that "where a defendant justifies words which amount to a charge of felony, and proves his justification, the plaintiff may be put upon his trial by that verdict without the intervention of a grand jury," there is much reason for requiring strict evidence of a plea which charges a felony and for not interfering with the verdict of not guilty on such a plea.

Whether or not this suggestion of Lord Kenyon be well founded—See *Rex v. Joliffe*, 4 T. R. 285, 293, and *Prosser v. Rowe*, 2 C. & P. 422, note *b*—the Courts usually call for strict proof on such an issue, and display much disinclination to interfere with the verdict of acquittal, the effect of which would be, as it were, to put the person accused a second time on his trial for the criminal offence.

In *Thurtell v. Beaumont*, 1 Bing. 339, which was an action against an insurance company to recover a loss by fire, the defence being arson, the Judge directed the jury that, in order to their finding a verdict against the plain-

tiff, they ought to be satisfied that the crime imputed to him was as fully proved as would justify them in finding him guilty of the criminal charge for the same offence. And it was held that the direction was right.

In *Chalmers v. Shackell et al.*, 6 C. & P. 475, where the action was for a libel imputing crime, and there was a plea of justification, Tindal, C. J., delivered a similar charge.

This was also the opinion of Denman, C. J., in *Willmet v. Harmer et al.*, 8 C. & P. 695, a similar action to the last with a similar plea.

In *Vaughton v. The London and North-Western R. W. Co.*, L. R. 9 Ex. 93, in an action against carriers for the plaintiff's goods, upon an issue that the loss arose from the felonious act of the defendants' servants, it was held sufficient to prove facts to render it probable that the felony was committed by some one or other of the defendants' servants, without giving such evidence as would convict any particular servant; but this decision was disapproved of in *McQueen v. Great Western R. W. Co.*, L. R. 10 Q. B. 569.

In the United States the weight of authority is in favour of limiting the application of "a rule which was originally adopted in *favorem vitæ*, in the days of a sanguinary criminal code, to cases arising on the criminal docket"; and "no longer to suffer it to obstruct or encumber the action of juries in civil suits sounding in damages": See *Ellis v. Buzzell*, 11 Am. 204; *Blaeser v. Milwaukee Mechanics' Mutual Fire Ins. Co.*, 19 Am. 747; *Elliot v. VanBuren*, 20 Am. 668; *Jones v. Greaves*, *Ib.* 752; *Ætna Ins. Co. v. Johnson*, 21 Am. 223. But in *Kane v. The Hibernian Mutual Fire Ins. Co.*, 20 Am. 408, the Court, after an elaborate review of the authorities, reached a conclusion the same as established in England by the old case of *Thurtell v. Beaumont*, 1 Bing. 339.

The latter appears to be the rule adopted in this Province: see *Richardson v. Canada West Farmers' Fire Ins. Co.* 17 C. P. 341.

At a very early period in the history of the Province it was said that "when the party charged has been acquitted,

after a full investigation, the evidence against him should be conclusive before the Court could properly subject him to answer the charge a second time: *Wilson v. Hill*, 5 O. S. 56-57.

At a later but still early period the Court said, "in cases of this kind we should with difficulty grant a second chance to the party urging such a defence": *Wallbridge et al. v. Follett*, 2 U. C. R. 280, 281.

In the comparatively modern case of *Edgar v. Newell*, 24 U. C. R. 215, 218, it was said that, "it is not usual to put a plaintiff deliberately charged with fraud or felony in a civil action twice, as it were, upon his trial."

In *Gould v. The British America Fire Ins. Co.*, 27 U. C. R. 473, 479, it was said, "We do not on the whole see our way to, as it were, again putting the plaintiff on his trial for this serious charge." (arson.)

In *McMillan v. The Gore District Mutual Fire Ins. Co.*, 21 C. P. 123, 125, it is said, "It is sufficient to say that there is no rule on the subject so inflexible as to govern a case like this." (arson); and a new trial was ordered, costs to abide the event.

The conclusion to be drawn from the cases is that, while the Court has the power in the exercise of discretion to grant a new trial in such a case, the discretion is not one to be exercised, except where the evidence so preponderates in favour of the truth of the charge as to evince, as it were, a determination on the part of the jury not to give effect to the law.

While of opinion that if a verdict had been found against the plaintiff on the plea of arson in this case, we would not have set it aside, we are unable to say that the facts indicating guilt are so strong, or the inferences to be drawn from them so irresistible as to have made it the absolute duty of the jury to have found such a verdict.

We therefore decline to grant a new trial on the plea of arson.

We shall now examine the remaining pleas on which the defendants rest their right to defeat the action.

We shall first consider the two pleas on which the verdict has been entered for the defendants. These are the seventh and ninth pleas.

The seventh plea is the one which sets up the non-payment of the assessment made in February on the premium note of the plaintiff, to wit, to the amount of \$12, of which, it is alleged, due notice was duly mailed to the plaintiff more than thirty days before the loss, and which was not paid at the time of the loss.

This plea is framed under the provisions of the statute 36 Vic. ch. 44, O.

Mutual insurance companies are authorized to accept premium notes of the insured for insurances, such notes to be assessed for the losses and expenses of the company in the manner in the Act provided: Sec. 41.

Premium notes are to be assessed under the direction of the board of directors at such intervals from their respective dates, for "such sums as the directors shall determine," and "for such further sums as they shall think necessary to meet the losses and other expenditures of the company," during the currency of the policies for which the notes are given, and in respect to which they are liable to assessment: Sec. 43.

The assessment must always be "in proportion to the amount of the notes or undertaking, having regard to the branch or department to which their policies appertain": Sec. 46.

Power is also given to the directors to form a "reserve fund": Sec. 49.

The assessment becomes payable "in thirty days after notice of such assessment shall be mailed to such member, or person who has given the premium note or undertaking, directed to his post office address, as given in his original application, or in writing to the secretary of the company": Sec. 43.

If the assessment "be not paid within thirty days after the day on which the said assessment shall have become due," the policy shall be void as respects all claim for losses occurring during the time of such non-payment: Sec. 44.

A notice of assessment is to be deemed sufficient, "if it embody the number of the policy, the period over which the assessment extends, the amount of the assessment, the time when and the place where payable": Sec. 45.

Two things are necessary under the foregoing sections to subject the person insured to a forfeiture of his policy for non-payment of assessment:

1. That there be a valid assessment. 2. That there be proper notice of it to the person assessed.

See *Atlantic Mutual Fire Ins. Co. v. Fitzpatrick*, 2 Gray 279; *Swamscott Machine Co. v. Parridge*, 25 N. H. 369; *Great Falls Mutual Fire Ins. Co. v. Harvey*, 45 N. H. 292; *York County Mutual Fire Ins. Co. v. Bowden*, 57 Maine 286, S. C., 5 Benn. 290; *Planters' Ins. Co. v. Comfort*, 50 Missip. 662, S. C., 5 Benn. 611.

If we should be of opinion that either of these things is wanting, we must decide in favour of the validity of the policy as against the seventh plea.

It is not enough for such a plea to aver that the defendants lawfully made and levied an assessment on the premium note to an amount stated, and that the same remained in arrear and unpaid for more than thirty days, whereby and by force of the statute the policy became void: *Crowley v. The Agricultural Mutual Ass. Co.*, 21 C. P. 567.

Where a legal assessment is averred, it is, according to a recent decision of the Common Pleas, enough for the plea to aver that the person assessed had "due notice" of the assessment, without stating the manner in which the notice was given: *Smith v. Mutual Ins. Co. of Clinton*, 27 C. P. 441; but in the absence of some authorized form given by statute or rule of Court, this mode of pleading is objectionable as submitting to a jury a question of law instead of a matter of fact: See *McKenzie et al. v. Dewan et al.*, 36 U. C. R. 512, 529, 530.

It is not necessary, after the happening of each loss, for the company to compute the assessments on the deposit notes requisite to meet the particular loss, but the company may adopt some general mode of procedure as to groups of

losses which will practically attain that end : *New England Mutual Fire Ins. Co. v. Belknap*, 9 Cush. 140.

The true principle of the assessment, after ascertainment of the amount needed to be raised (*Ohio Mutual Ins. Co. v. The Marietta Woolen Factory Co.*, 3 Ohio 348) is to ascertain the proportion which the deposit note of the particular member liable to the assessment bears to the deposit notes of all the members liable to the same assessment, having regard to the branch or department to which their policies appertain : See *The Herkimer County Mutual Ins. Co. v. Fuller*, 14 Barb. 373 ; *Devendorf, Receiver, &c., v. Beardsley*, 23 Barb. 656.

If it appear that the end has been attained with substantial accuracy by the mode of assessment adopted, the assessment will be held sufficient : *Marblehead Mutual Fire Ins. Co. v. Underwood*, 3 Gray 210.

The insured is not in any case liable for an assessment made before his insurance was effected or premium note given : *Green v. The Beaver and Toronto Mutual Fire Ins. Co.*, 34 U. C. R. 78.

Where the company has consented to the transfer of the policy to a mortgagee, a notice of the assessment given only to the mortgagor will not invalidate the policy as against the mortgagee : *Guggisberg v. The Waterloo Mutual Fire Ins. Co.*, 24 Grant 350.

The levy and acceptance of a subsequent assessment may be held to be a waiver of the right to forfeit the policy for non-payment of a prior assessment : *Smith v. The Mutual Fire Ins. Co. of Clinton*, 27 C. P. 441. Much more so if the acceptance be of the two assessments : *Lyons v. The Globe Mutual Fire Ins. Co.*, 27 C. P. 567. Payment after loss will not have this effect : *S. C.*, 28 C. P. 62, 64.

It is argued that the assessments here were on the policy but not on the premium notes for the policies. We do not accede to this argument. The language used in the resolution is not so clear as it might have been, but it sufficiently appears that the assessment was one under the Act upon the premium notes of the policies classified according

to date, and varying in amount according to the date. The assessment is not attacked as having been made on an erroneous principle, or for an excessive amount. We may therefore assume, without deciding except as against the particular objection raised, that the assessment is a valid assessment.

Now under the operation of this assessment the premium note of the plaintiff for the policy sued on, which was issued on the 8th of October, 1876, and numbered 10,362, would be subject only to an assessment of three per cent. or \$6.

The notice sent to plaintiff, supposing it to have been properly sent and received, was of an assessment "on premium notes 8,879 and 10,362," and was made up at the rate of six per cent., or \$18 on the two policies.

One of the things made necessary by sec. 46 to the validity of the notice is, "*the amount* of the assessment."

It was argued that, while No. 10,362 is the number of the policy sued on, No. 8,879 is a different policy, either on real estate, or a policy of which the one sued upon is said to be a renewal. It is not clear on the evidence which is the fact. But it can be of no consequence; for, as under the resolution making the assessment on notes for policy issued "between the 8th September and the 18th October, 1876," is only "three per cent.," a demand of six per cent., because of some earlier policy, is the demand of an excessive amount, and cannot be upheld.

We are therefore of opinion that the verdict entered for the defendants on the seventh plea must be set aside, and a verdict entered for the plaintiff.

The next plea upon which the defendants have a verdict is the ninth. It avers that the policy was made and issued and accepted by the plaintiff subject to a condition *printed thereon*, pursuant to the statute in that behalf, in the words and figures following, setting out the condition, No. 10 (g), of the statutory conditions in the schedule to 39 Vic. ch. 24, O. There is no such condition in fact printed on the policy, but the contention is that it must, under the "Fire Insurance Policy Act of 1876," be deemed to be printed.

The meaning and effect of that Act was much discussed in *Ulrich v. The National Ins. Co.*, 42 U. C. R. 141. My brother Wilson in that case, at p. 163, expressed the opinion that if the statutory conditions be not contained in or upon the policy as directed by the Act, they are not to be deemed a part of the policy *as against the insured*. Although I thought it unnecessary, in the view which I took of that case, to decide the point, and after mentioning some of the arguments for and against such a construction, said, at p. 153: "If insurance companies so far neglect the provisions of a public Act of the Legislature as in no manner whatever to take notice of them, or any of them, in the policies they issue, they must not complain if, *as against the insured*, the policies should be held to be policies issued without conditions of any kind."

Subsequent reflection has induced me to concur in the opinion expressed by my brother Wilson.

We therefore hold that as the condition on which the defendants rely in the ninth plea was not printed on the policy as a statutory condition, with or without variation, the verdict in favour of the defendants on that issue must be set aside and entered for the plaintiff.

The issues remaining on which the defendants claim a verdict are the fifth and sixth.

These depend upon conditions to which the policy is alleged to be subject, to the effect that the loss is not to be deemed payable "until three months after the receipt of proofs of the loss." These pleas are apparently framed under the twelfth and thirteenth conditions endorsed on the policy, but these conditions are very different to the twelfth and sixteenth of the statutory conditions. We ought therefore, *as against the insured*, to read the policy as if without these or any other conditions.

It is in the power of an insurance company to contract to pay the loss without conditions of any kind as to preliminary proofs. This is the ordinary obligation of persons liable to make good losses under covenants and other contracts of indemnity. It is usual however, for insurance

companies to stipulate that there shall be no liability until the lapse of a certain time after the receipt of preliminary proofs. This can only now be done in Ontario in the manner pointed out by "The Fire Insurance Policy Act, 1876."

The defendants have not for some reason seen fit to print on their policies the statutable conditions made necessary by that Act. They must therefore take the consequence, which is, in our opinion, that, *as against them*, their policy is one without conditions of any kind.

Attention is drawn to sec. 16 of the statutable conditions, which is as follows: "The loss shall not be payable until *thirty days* after completion of the proofs, *unless otherwise provided by statute or agreement of the parties*," and it is argued that the contrary is here provided both by statute and the agreement of the parties.

If the sixteenth condition and other statutory conditions were printed on this policy as a part of it, we would necessarily have to consider and to decide as to the meaning of these words in a case which called for their interpretation; but this, owing to the omission to print the statutory conditions, is not in our opinion such a case.

Reliance, however, is placed on the words of the policy, as follows: "The said losses or damage to be estimated according to the true actual value of the property at the time the same shall happen, and to be paid within three months after due notice is given by insured according to the provisions of the said Act," meaning 36 Vic. ch. 44, sec. 52, O.; and when we turn to that enactment we find the following: "In case of any loss or damage by fire happening to any member upon property insured with the company, such member shall give notice thereof to the secretary of the company forthwith, and the proofs, declarations, evidences, and examinations, *called for, by or under the policy*, must be furnished to the company within thirty days after said loss, and upon receipt of proofs and notice of claim as aforesaid, the board of directors shall ascertain and determine the amount of such loss or damage, and such amount shall be payable in three months after the receipt by the company of *such proofs*."

There are two answers to the argument for time based on the reading of the policy and this section :

1. There is no plea framed under the section.

2. The operation of the section is made to depend upon there being a policy which *calls for proofs*, &c., and the plaintiff's policy, in our opinion, is not such a policy.

The Fire Insurance Policy Act of 1876 applies to mutual as well as to other insurance companies. It is an Act of the Legislature, subsequent to 36 Vic. ch. 44, O., and supercedes the latter wherever it is inconsistent with it.

In the public interest it is necessary that all fire insurance policies should have uniform and reasonable conditions. Insurance companies, whether mutual or otherwise, which disregard its provisions, must suffer the penalty, and the penalty, in our view, is, that the policy must, as *against them*, be read as one without conditions of any kind.

In *Ulrich v. The National Ins. Co.*, 42 U. C. R. 161, where it was argued that the promise was controlled by what appeared in the policy, which was to pay after "the loss shall have been ascertained and proved in accordance with the terms of and provisions of this policy," we intimated our opinion that this was an attempt to add to or vary the statutory conditions otherwise than in the manner indicated by the statute, and so was nugatory.

If it were left in the power of an insurance company to abstain from printing the statutory conditions, and then insert in the body of the policy conditions as to payment, contrary to the statutory conditions, the effect would be to permit underwriters to vary the statutory conditions otherwise than in the manner directed by the statute.

Fully recognizing the propriety and necessity of such legislation as contained in "the Fire Insurance Policy Act, 1876," it is our duty not only to see that the provisions therein contained are fully carried out, but to see that by no device the praiseworthy intention of the Legislature is thwarted.

The verdict entered for the plaintiff on the fifth and sixth pleas is, in our opinion, rightly entered for him.

The result is that the plaintiff's rule will be made absolute to enter the verdict for him on the seventh and ninth pleas, and the defendants' rule discharged.

Rules accordingly.

NAUGHTER V. THE OTTAWA AGRICULTURAL INSURANCE COMPANY.

Insurance—Application filled up by agent—Condition as to being the agent of insured—Buildings within 100 feet—Lumber on premises—Oven.

An application for insurance filled in by the company's agent had, at the foot thereof, a notice requesting the applicant to answer the questions fully, and that if the agent should fill up the application he would be the agent of the applicant and not of the company, but it did not state that the company would not be bound by any statement made to the agent and not contained in the application. By the application the agent was asked to state his opinion of the risk, and whether he recommended the company to accept it, his answer to which was "very good." When the application was made, the lot on which the insured premises were situate, was one of eleven lots mortgaged for \$1000, but there was an arrangement with the mortgagee to release any lot on payment of \$100 thereon. Before the insurance was effected the insured had paid \$300 on the mortgage, and intended having this lot released; and the agent who solicited the insurance and filled up the application being informed by him of all the facts said the mortgage was not worth mentioning in the application, and accordingly answered to the question as to incumbrances that there were none.

Held, that under these circumstances the company could not set up that there were any misrepresentations as to incumbrances.

One of the conditions of the policy provided that misrepresentation or concealment of facts in the application, or attempt to defraud the company, should avoid the policy. To the question in the application whether there was any building within 100 feet of the assured premises, it was answered that there were none.

Held, that the existence of a small building used as a water-closet within 46 feet of the insured premises, which had nothing to do with the fire, and in no way increased the risk, did not invalidate the policy, as the condition contemplated a fraudulent concealment only, which was not alleged, and before accepting the risk the agent, as his instructions required him, had inspected and made a survey of the premises.

At the time the insurance was effected, the house was not completely finished, so that some lumber remained on the premises, and carpenters were employed, of which the agent was fully aware, but there was no proof that the risk was thereby increased.

Held, that this did not avoid the policy.

A further condition provided that if during the continuance of the policy the premises should be used for carrying on any trade or business whereby the risk was increased the policy should be void. After effecting the insurance the insured built an oven on the premises, but it was safely built, and was only in use for a short time, and there was evidence to shew that it did not increase the risk. It also appeared that according to the agent's instructions he had power when the risk became more hazardous, to cancel the policy, and though aware of the oven, did not do so.

Held, that this did not avoid the policy.

DECLARATION:—On a policy of insurance against fire, dated 17th December, 1875, to the amount of \$1,000.00, on the dwelling house and premises of the plaintiff, in the township of Nepean, in the county of Carleton, averring loss, &c.

Pleas :

1. Denial of the policy.
2. Traverse of the loss by fire.
3. Traverse of the insurable interest of the plaintiff.
4. That the premises were incumbered by a mortgage to Joseph Hinton, contrary to the representations in the application for insurance.
5. Omission by the plaintiff, in the application, to mention a small frame building within 100 feet of the insured premises.
6. Denial that the plaintiff gave immediate notice of his loss, as required by the conditions of the policy.
7. Denial that plaintiff delivered to the defendants a particular account of the amount of his loss.
8. Same as the seventh plea, but more special in form.
9. Misrepresentation and concealment of the mortgage in the claim papers.
10. Erection by the plaintiff, after the making of the policy, of a wooden building about twelve feet square, adjoining the insured premises, used for the purposes of a bakery.
11. Similar plea, averring that the risk was increased.
12. Deposit of lumber and employment of carpenters on the insured premises, whereby the risk was increased.

The plaintiff joined issue on all the pleas.

He also replied on equitable grounds to the fourth plea : that the insurance was effected by and on behalf of the defendants, through their agent, who was duly authorized to solicit insurance on their behalf : that the plaintiff duly stated to the agent the facts respecting his title, and the agent filled up the application for insurance, which was prepared by the agent for his, the plaintiff's, signature ; and the plaintiff, believing the application to be correct, signed it ; and that at the time of the signing the plaintiff was not aware of the conditions of the policy mentioned in the fourth plea.

A third replication to the ninth plea alleged that the mortgage, although undischarged, was paid ; and that the agent, before filling up the application for insurance, had knowledge of the fact.

The plaintiff also replied to the sixth, seventh, eighth, and ninth pleas on equitable grounds : that immediately after the loss he gave notice thereof to the defendants, who thereupon forwarded to the plaintiff blank forms of papers to be filled up, containing proofs of loss, &c. : that the same were accordingly filled up and delivered to the secretary and manager of the defendants, who then informed the plaintiff that the same were satisfactory, and promised that the plaintiff's loss would be adjusted and paid.

And for a third replication to the ninth plea the plaintiff on equitable grounds, averred that the mortgage therein mentioned is the same mortgage as mentioned in the third replication to the fourth plea, and that defendants, with full knowledge of all the facts relating thereto, accepted the proofs and promised to pay the loss.

And for a second replication on equitable grounds to the tenth and eleventh pleas, the plaintiff denied the erection of the buildings therein mentioned, with the exception of the bakery, and averred that the latter was erected by the leave and license of the defendants.

And for a second replication to the twelfth plea, the plaintiff averred that the only lumber placed in store in or about the said premises, was a small quantity of lumber

which was being used in repairing and finishing the said house, and that this was done with the knowledge and consent of the defendants.

The defendants joined issue on the plaintiff's special replications to the fourth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth pleas.

And for a second rejoinder on equitable grounds to the special replication to the fourth plea, the defendants averred, that by the application for the insurance it was provided, that if the agent of the company asking the risk fills up the application, the agent will, in that case, be the agent of the applicant and not the agent of the company; and that the policy was issued to the plaintiff solely upon the representations contained in the application.

Issue :

The cause was tried before Burton, J. A., without a jury, at Ottawa, at the Fall Assizes of 1877.

It appeared that the application for insurance was filled up by the authorized agent of the defendants to solicit risks. This risk was obtained upon his solicitation. When the application was made, the plaintiff was the owner of a block of land consisting of eleven lots, which he purchased from Mr. Hinton. There was a mortgage upon them for \$1000. There was an arrangement that upon payment of \$100 on any of the lots, such lot would be released from the operation of the mortgage. Before the plaintiff insured he paid \$300 on account of the mortgage, which entitled him to the release of three lots. He intended to have had the lot on which the house, &c., insured, were situate, released.

He swore that at the time of the filling up of the application he told the agent all about the mortgage, and the latter said it was not worth mentioning in the application.

The agent did not venture positively to deny that assertion.

The policy was dated 17th December, 1875, and was for \$1000 from 17th December, 1875, to 17th December, 1878, and was without conditions endorsed, but had all the old forms of insurance conditions embodied in the policy.

After the plaintiff received the policy, he built an oven on the place. Before doing so he spoke to the agent of the company. He also informed the company of it, and had it, as he supposed, endorsed at the head office on the application for the insurance. The oven was in use only for a short time. It was safely built. There was evidence that it did not increase the risk. It in no manner contributed to the fire.

There was a small frame building within 100 feet of the house insured, which was not mentioned in the application for insurance. It was used as a water-closet, and had nothing whatever to do with the fire. It was said that there was also another small building within the 100 feet, not pointed out in the application.

When the insurance was effected the house was, as the agent well knew, not completely finished; and the consequence was that, until finished, there was some lumber lying around. The house was in part lathed and plastered after the acceptance of the risk.

The fire took place on the night of the 4th or morning of the 5th November, 1876. The origin of the fire was unknown. The building at the time of the fire was proved to be worth \$1,600.00 in cash.

The plaintiff, immediately after the loss, notified the defendants of it, and applied for and obtained from the defendants blank forms of proof papers. These he filled up and returned to the defendants on 9th November, 1876. In these he described the property as subject to a mortgage of \$50.00 at the time of the fire. This was filled up by the mortgagee, who supposed, as there had been no release of the lot on which the loss occurred from the mortgage, it should be described as encumbered to that amount.

No objection, notwithstanding the lapse of a reasonable time, was made to the proof papers; on the contrary, there were offers of a compromise. The president of the company spoke of the company being very hard up, and wanted the plaintiff on that ground to accept less than his real loss. But there was no compromise.

Counsel for the defence, at the close of the plaintiff's case, moved for a nonsuit on the following grounds :

1. That the evidence shewed the risk was increased by the erection of the oven, and that the consent to erect it was not endorsed as required by the condition.

2. That the risk was increased by carpenters being engaged in and work being done on the premises.

3. That there was an omission to mention buildings within 100 feet of the premises insured.

4. That there was an omission to mention the encumbrance in the application for insurance.

The learned Judge reserved his decision until the close of the defence.

The only witness called for the defence was the secretary and manager of the defendants. He said he had no knowledge of the erection of the oven till after the fire, nor had he any knowledge of the mortgage on the property, or that there was carpenter work of any kind being done on the premises ; and he swore that the agent of the company never gave any information to the company either as to the oven or the incumbrance.

The learned Judge found in favour of the defendants upon the strictly technical objections taken by the defendants, but hoped that the Court, after mature consideration, and an opportunity to investigate the cases, would come to the conclusion that the verdict ought not to be sustained.

In Michaelmas Term, November 23, 1877, *T. H. Spencer* obtained a rule calling on the defendants to shew cause why the verdict should not be set aside, and a new trial had between the parties, on the ground that the verdict was contrary to law and evidence, and the weight of evidence, and on the ground that the replications respecting the alleged incumbrance and additional erections and buildings on the insured premises were duly proved, and shew the plaintiff's right to recover ; and why the verdict should not be set aside, and a verdict entered for the amount of the policy declared on and interest, or for such other sum as the Court should think proper, pursuant to the Law Reform Act.

During Easter Term, February 7, 1878, *J. K. Kerr*, Q. C., shewed cause, and cited : *Bleakely v. Niagara District Mutual Ins. Co.*, 16 Grant 198, 200; *Muma v. Niagara District Mutual Ins. Co.*, 22 U. C. R. 214; *Martin v. Home Ins. Co.*, 20 C. P. 447; *Johnstone v. Niagara District Mutual Ins. Co.*, 13 C. P. 331; *Samo v. Gore District Mutual Ins. Co.*, 26 C. P. 405, 1 App. 545; *Shaw v. St. Lawrence County Mutual Ins. Co.*, 11 U. C. R. 73; *Stickney v. Niagara District Mutual Ins. Co.*, 23 C. P. 372; *Moore v. Connecticut Mutual Life Ins. Co.*, 41 U. C. R. 497; *Parker v. Agricultural Mutual Ins. Co.*, 28 C. P. 80; *Whitlaw v. Phoenix Ins. Co.*, 28 C. P. 53; *Sinclair v. Canadian Mutual Ins. Co.*, 40 U. C. R. 206; *Sherboneau v. Beaver Mutual Ins. Association*, 30 U. C. R. 472; *Chatillon v. Canadian Mutual Ins. Co.*, 27 C. P. 450; *Billington v. Provincial Ins. Co.*, 24 Grant 299; *Wyld v. Liverpool, &c., Ins. Co.*, 23 Grant 442 (a); *Scott v. Niagara District Mutual Ins. Co.*, 25 U. C. R. 119, 126; *Johnston v. Canada Farmers' Mutual Ins. Co.*, 28 C. P. 211; *Lomas v. British America Ass. Co.*, 22 U. C. R. 310; *Heneker v. British America Ass. Co.*, 13 C. P. 99; *Lyndsay v. Niagara District Mutual Ins. Co.*, 28 U. C. R. 326.

T. H. Spencer, contra, cited *Phillips on Ins.*, 5th ed., 527; *Mechanics' Building, &c., Society, v. Gore District Mutual Ins. Co.*, 40 U. C. R. 220, 226; *Abrahams v. Agricultural Mutual Ass. Association*, 40 U. C. R. 175; *Chapman v. Gore District Mutual Ins. Co.*, 26 C. P. 89; *Davis v. Scottish Provincial Ins. Co.*, 16 C. P. 176, 185; *Hopkins v. Provincial Ins. Co.*, 18 C. P. 74, 86; *Wyld v. Liverpool, &c., Ins. Co.*, 21 Grant 458, 23 Grant 442; *Laidlaw v. Liverpool and London Ins. Co.*, 13 Grant 377; *Kelly v. Isolated Risk, &c., Ins. Co.*, 26 C. P. 299; *Wing v. Harvey*, 5 DeG. McN. & G. 265; *Bunyon on Fire Ins.*, 57; *Peoria Ins. Co. v. Hall*, 12 Mich. 202.

March 15, 1878. HARRISON, C. J.—The merits of this case are entirely with the plaintiff.

It is strange that men having property in jeopardy on

(a) Affirmed by the Supreme Court, January 28, 1878, but not yet reported.

which it is supposed there is an insurance indemnity, take so little trouble either to understand or to apply the contract of insurance.

One reason for this apparent carelessness may be that the insured rely too much on the representations of agents for insurers, some of whom apply all the energy possible to earn their commission without a due regard to the claims of honesty and good faith.

It would seem that the iniquitous defences to insurance claims which have already prevailed, are not enough to awaken intending insurers to the possible treachery of those in whose honesty and fair dealing they blindly confide.

The Legislature has again and again endeavoured to protect persons insured against fire from the disastrous consequences of too much simplicity and too much credulity, where suspiciousness and astuteness should instead prevail.

Had this policy been issued after the passing of the Act of the Ontario Legislature, providing for the uniformity of conditions in policies of insurance, 39 Vic. ch. 24, we would have been in a position speedily to do justice according to law.

But as the policy was issued in 1875, and the Act did not take effect until 1st July, 1876, we must decide upon the claim of the plaintiff without the aid of that Act, and according to the state of the law as it existed before the passing of that Act.

The defendants, according to the instructions to their agents, instead of *solely* relying, as they profess to do, for their knowledge of the proffered risk on answers to questions submitted to the proposed insurer, in their eagerness for business, employ agents to solicit risks, entrust them with blank forms, instruct them to make surveys of the proffered risks, instruct them to cancel policies where the risk has from any cause become more hazardous, and to do many other things on behalf of the company, but with a warning not to commit the company, if they can avoid it.

The blank application furnished to the agent for the purpose of this business, has at the foot of it these well known but seldom read words:—

“The applicant is requested to answer the above questions fully, as it is expressly agreed on the part of the applicant that this survey, as well as the diagram of the premises, shall form a part and be a condition of this contract. It is further agreed that if the agent of the company fill up the application, he will in that case be the agent of the applicant, and not the agent of the company.”

This disclaimer is, according to *Phillips on Insurance*, 5th ed., sec. 1878, often disregarded by the Courts of the United States, and has been made the subject of express legislation.

The difficulty, if any, which we feel in this case arises from the fact that the Courts in this Province have not as yet gone so far on the path of justice as most of the Courts of the United States.

The agent of the defendants is, by the application, required “to shew on the diagram what assurance this company may have on adjacent premises. He must also be particular in stating how the adjacent buildings are occupied, and of what material built and covered.” The agent is also asked, “What is your opinion of the risk? Do you recommend the company to accept it?”

In answer to the latter question the agent in this case after inspection and survey of the premises, and after himself filling up the application, said “Very good.”

There are no words on the face of the application making the answers to the questions warranties of the facts represented, but in the policy subsequently issued, which makes the application a part of the policy, it is declared that “the application will be taken and deemed to be warranted on the part of the assured.”

The answer to the question in the application, “What incumbrance, if any, is now on the said property?” is “None.” It is in the hand writing of the agent to whom the assured, according to the evidence, explained that there was an incumbrance, but which the agent thought it was unnecessary to mention.

This is one of the many defences now raised as against

the plaintiff's right to recover. The defendants rely on the false answer as a breach of the condition of the policy. The plaintiff replies that these facts were stated to their agent who filled up the application, and who thought it unnecessary to state the facts in the application. The defendants rejoin, that in and by the terms of the application the agent of the defendants filling up the application is in that case the agent of the assured, and not of the defendants; and that the policy was issued to the plaintiff solely upon representations contained in the application.

The application on production proves the first part of the rejoinder, and the manager of the defendants, as far as he could consistently with the facts of the case, gave evidence in support of the remainder of it.

The legal questions were as thoroughly argued before us as if there had been demurrers to the replications and rejoinders, and all necessary amendments made to raise the real questions in controversy between the parties.

In some recent cases in this Province, notwithstanding the use of words similar to those at the foot of the application in this case, insurance companies have been held bound by the knowledge of the agent to solicit risks acquired in the course of his business, or rather prevented from setting up their own ignorance of their agent's knowledge acquired in the course of his agency, notwithstanding he omitted to communicate it. See *Wyld v. London, Liverpool and Globe Ins. Co.*, 21 Grant 458, affirmed in appeal, 23 Grant 442, and further affirmed by the Supreme Court on 28th January, 1878; *Williams v. Canada Farmers' Mutual Ins. Co.*, 27 C. P. 119; *Chatillon v. Canadian Mutual Ins. Co.*, *Ib.* 450; *Shannon v. Hastings Mutual Ins. Co.*, 26 C. P. 380, affirmed, 2 App. 81 (a); *Shannon v. Gore District Mutual Ins. Co.*, 40 U. C. R. 188; *Sinclair v. Canadian Mutual Ins. Co.*, *Ib.* 206; *Brown v. Ottawa Agricultural Ins. Co.*, 42 U. C. R. 282.

(a) Affirmed by the Supreme Court, but not yet reported.

These cases in principle affirm the right of the plaintiff in this action to recover, notwithstanding the fourth plea in this case. They, in effect determine that the replication to that plea is good, and the rejoinder bad.

The two cases cited in the argument which are against this position were decided many years since, and are both distinguishable. These are *Johnstone v. The Niagara District Mutual Ins. Co.*, 13 C. P. 331; and *Bleakley v. Niagara District Mutual Ins. Co.*, 16 Grant 198. In each of them there was not only the statement at the foot of the application, that the agent when filling up the application was the agent of the insurer, but, as in *Moore v. Connecticut Mutual Life Ins. Co.*, 41 U. C. R. 497, 499, "that the company would not be bound by any statement made to the agent not contained in the application." There is no such statement in the present application.

We may therefore decide in favour of the plaintiff, so far as the mortgage is concerned, without overruling or in any manner interfering with either of these cases.

The omission to mention the building or buildings within 100 feet of the insured premises cannot be held to invalidate the policy.

This defence in the fifth plea is rested on so much of the policy as provides that "If any misrepresentation or concealment of facts has been made in the application * * * or if he shall in any manner make an attempt to defraud this company, the policy shall be void." The allegation is that there really was a small frame building situate about forty-six feet from the house alleged to have been insured.

We do not know what small building this was, unless the small building suggested in the argument, which is used as an adjunct to most houses in the present state of civilization.

There are two reasons against allowing this defence to prevail. The first, that the condition appears to contemplate fraudulent concealment only: *Laidlaw v. Liverpool and London Ins. Co.*, 13 Grant 377; *Redford v. The Mutual Fire Ins. Co. of Clinton*, 38 U. C. R. 538. And the

second, that as the agent of the defendants before accepting the risk inspected and made a survey of the proposed risk, the company ought to be held bound by this inspection: *Re Universal Non Tariff Ins. Co.*, L. R. 19 Eq. 485; *Shannon v. Hastings Mutual Ins. Co.*, 26 C.P. 380; *Benson v. Ottawa Agricultural Ins. Co.*, 42 U. C. R. 282; *Continental Ins. Co. v. Kasey*, 18 Am. 681; *May v. Buckeye Mutual Ins. Co.*, 25 Wis. 291, S. C. 5 Benn. 285. See further *Keith v. Globe Ins. Co.*, 52 Ill. 518, S. C. 5 Benn. 249; *Carrugi v. Atlantic Fire Ins. Co.*, 40 Georgia 135, S. C. 5 Benn. 260.

These observations in the main dispose of any other building within the 100 feet, which was in existence at the time of the inspection and survey of the agent of the premises.

So much of the defence as in the twelfth plea rests on the deposit of lumber and carpenters being engaged on the premises, may be disposed of against the defendants, not only on the ground that the house was unfinished when the risk was accepted, as the defendants' agent well knew but that there is no proof of actual increase of risk arising therefrom.

Then as to the oven. The defence arises under the eleventh plea. The policy provided that, "If the use or occupation of the above mentioned premises shall at any time during the period for which this policy would otherwise continue in force without the consent of the company endorsed thereon, be so changed or appropriated, applied or used to or for the purpose of carrying on or exercising therein, any trade, business, or vocation which would increase the risk or hazard, or the risk be increased in any manner, by means within or not within the control of the insured; thenceforth and immediately upon the same being so changed," &c., "this policy shall cease and be of no force or effect."

The agent, according to the instructions proved at the trial, had power "where the risk has, from any cause, depreciated or become hazardous, at once to *cancel the policy*." There was evidence to shew he knew of the alleged increase

of hazard, and did not cancel the policy on that or any other ground. Besides, whether the oven did increase the risk or not, was a matter of fact for decision on the evidence. There is evidence which points to the fact that the oven was so well built, that there was no increase of risk by reason either of the erection of the oven or of the baking which was done therein. Now that the fire has taken place, and there is a necessity if possible to escape payment of the amount of the loss, those connected with the insurance company are of opinion that there was an increase of risk, although they do not go so far as to pretend that the alleged increase of risk had anything whatever to do with the fire. Others who had no interest, either as party to the suit or as an employee of a party to the suit, are of a different opinion. We accept the latter. The defence as to the oven, therefore, in our opinion, fails.

No particular objection was pointed out during the argument as to the alleged insufficiency of the proofs after the fire. It is no part of our duty to scrutinize them in order, if possible, to discover flaws in them, so as to enable the defendants to defeat what appears to be an honest and meritorious demand. The fact that the officers of the company failed to discover or point out to the owner any such flaws, is not much inducement for us to undertake the task. The further fact that after receiving the proof papers, and holding them for a long time, the officers, or some of them, proposed a reduction of the claim simply on the ground of the need of the company, is an additional reason for not attempting the exploration. Such a defence is, under the circumstances, both inequitable and unjust. See *Shannon v. Hastings Mutual Ins. Co.*, 2 App. 81; 38 Vic. ch. 65, sec. 1, O.

We have, upon the whole, come to the conclusion that the rule should be made absolute to enter a verdict for the plaintiff for \$1000, and interest from 9th January, 1877.

Rule absolute.

HASTINGS V. THE CORPORATION OF THE CITY OF ST.
CATHARINES.*Ways—Dedication—Acceptance by public—Ejectment.*

In order to widen a street in the City of St. Catherines, the plaintiff and other owners of the land on each side of the street, agreed to give the corporation a strip of land bordering thereon, not exceeding five feet in depth. The street some forty years ago had been dedicated by the then owner of the land to the public, and a plan thereof made, by which the plaintiff appeared to be some 7 feet on the street, but as the street was actually laid out on the ground and used by the public the 7 feet was included within the owner's fence and had continued so ever since. The corporation claimed that this 7 feet was part of the street, and that they were therefore entitled to take from the plaintiff under the agreement 5 feet in rear of the 7 feet.

Held, in ejectment, that this 7 feet could not, under the circumstances, be deemed to be part of the street, not having been used or accepted by the public as such, and that the corporation under the agreement could only take the five feet bordering on the street as it then existed.

Ejectment for part of town lot number forty-one, in block C., in the city of St. Catharines.

The defendants limited their defence to the parcel described as follows :—That portion or strip of said land, five feet in depth, and extending the whole width of said town lot number forty-one, in block C, as set forth in the said writ, formerly abutting on Niagara street, and taken by the defendants for the purpose of widening said Niagara street, and now forming a portion of said street, under a by-law duly passed by the said defendants on the 9th of August, 1876, under the powers conferred by the Municipal Institutions Act of 1873.

The defendants denied the plaintiff's title, and they asserted title in themselves under an agreement in writing made between them and the plaintiff.

The defendants also pleaded on equitable grounds: that in the execution of the powers conferred upon them by the Municipal Act, they determined to widen Niagara street, in the city, from Church street, in the city, to the gaol, such widening being for the public convenience, as well as for the benefit of the residents on Niagara street: that the defendants applied to many of the owners of land abutting on Niagara street, between Church street and the gaol, and,

amongst others to the plaintiff, to consent to the widening of the said street between the said limits, and to grant and convey to the defendants the land necessary for that purpose ; and the plaintiff, and many other owners of such land so abutting on the said street, entered into and executed an agreement with the defendants to give, grant, and convey to the defendants a strip of the land of the plaintiff in the writ mentioned and described, and of said other owners abutting on the said street, for the purpose aforesaid : that the defendants thereupon proceeded to acquire in the manner provided by the Municipal Act, the land of the persons abutting on the said street who refused or were unable to execute such agreement, or to give, grant, and convey the said land voluntarily, for the purpose of widening the said street, to the defendants. And the defendants took proceedings to pass, and did pass a by-law pursuant to and in the manner required by law in that behalf, for widening the said street, and for acquiring the said lands of the said other persons who refused or were unable to grant the same to the defendants, of all which the plaintiff had notice. And the defendants, in pursuance of the said agreement with the plaintiff and the said other owners, and with their knowledge, consent, and concurrence proceeded to take, and did take such part of the lands of the plaintiff and said other persons, parties to the said agreement, as was necessary for the purpose of widening the said street where the said lands abutted thereon, and as mentioned and set forth in the said agreement ; and the defendants have completed the widening of the said street between Church street and the gaol, and the said land in the writ mentioned forms and is part of the said public highway or street called Niagara street. And the defendants say that but for the agreement so made by the plaintiff with them to give the said land for the purpose aforesaid, and but for the consent of the plaintiff to the taking by the defendants of the said lands to widen the said street, they would, as the plaintiff well knew, have acquired the same under the said by-law, or would have

passed another by-law for the purpose of obtaining the same under the compulsory powers conferred by the said Act.

And for a further defence the defendants say that the land in the writ mentioned is part of a certain public highway or street in the said city called Niagara street.

Issue was joined on these defences.

The plaintiff also replied to the defence on equitable grounds: that the land referred to in the said agreement, is other and different land from that referred to in the defendants' notice of defence, and to which they limit their defence.

And for a further replication to the said equitable defence, the plaintiff says, that at the time of signing the said agreement, he and those through whom he claimed had been in possession for upwards of forty years of a piece of land to the west of the land to which the defendants limit their defence, adjoining and abutting upon the then travelled road, and which the plaintiff believed to be his property; and that he, in order to widen the then travelled road, agreed to convey to the defendants a quantity sufficient to widen the said travelled road to the width mentioned in the said agreement, and that he signed the said agreement in ignorance of the fact that the piece of land which he intended to convey to the defendants was a part of the original allowance for road as originally laid out, and that it never was intended by the said agreement that any land other than that to the west of the land to which the defendants limit their defence, should be conveyed to the defendants.

And for a further replication to the said equitable defence, the plaintiff says, that the defendants failed to comply with the terms and conditions of the said agreement, and therefore were not entitled to a conveyance of the land therein mentioned and referred to.

The cause was tried before Galt, J., without a jury, at St. Catharines, at the Fall Assizes of 1877.

The agreement pleaded was dated the 13th of May, 1876.

It was directed to the mayor and corporation, and was as follows :—

“We, the owners of the land bordering on either side of Niagara street, considering that the widening of said street will be both a public and local benefit, hereby undertake and agree to convey to the corporation a strip of land, not exceeding five feet in width, bordering on each side of said street, for the purpose of increasing its width, provided the council of the city shall, within the space of one year from the first day of July next ensuing, take the necessary legal steps to widen the said street, where necessary, to an extent as set forth above, from Church street to the gaol, and shall, at its own expense, remove any buildings and fences that may be in the way.”

This was signed by fourteen persons, including the plaintiff.

The by-law which recited the petition, and which was passed on the 9th of August, 1876, stated that the petitioners had requested the street to be widened to the extent of fifty feet, and that they had agreed to give a certain portion of the lands owned by them on either side of the street within the said limits for that purpose. The by-law then directed that Niagara street be widened to fifty feet, and “that in order to widen said portion of said street there shall be taken the following parcels of land bordering or fronting on each and either side of said portion of said Niagara street, that is to say, five feet from the frontage of the several properties lying on each side of said, Niagara street between Church street and Welland Avenue and also five feet from the frontage of the property lying on the easterly side of said Niagara street, to the distance of three hundred and seventy-seven feet northerly from said Welland Avenue, which said parcels of land shall be added to and form a portion of said Niagara street.”

Edward Gardener, P. L. S., said :—I am city surveyor. I know Niagara street, and knew it for a number of years before it was widened in the spring of the present year. I laid out the street for the purpose of widening it under the

by-law. It was to be widened five feet on either side. I know the property in dispute. I ran the line of Niagara street as laid down by Messrs. Phelps and Merritt, who at one time owned all the lands where Niagara street crosses. I got the description from a deed executed by these gentlemen on the 1st of December, 1838. The description of that street is not specifically given in the deed, but is shewn on a plan attached to it, a copy of which I produce.

I ran, what I consider a true line, after the by-law was passed. I took five feet out of the line run by me off the frontage of lot 35. I paid no attention to the then existing fences.

Cross-examination. — I have known Niagara street upwards of fifteen years. There was no alteration in the limits of Niagara street, that I am aware of, until I made an alteration when I ran the line. There was a plank sidewalk on the east side of it in front of lot 35, at the time when I ran the line. I think it was about a foot to the end of the fence. I think it was the chairman of the Board of Works instructed me to run the true line. I do not recollect positively having informed the petitioners or anybody, of my opinion. The street was not of a uniform width when I went to run the line. I took steps to obtain the true position of the street as shewn on the plan. The plan does not shew the width in figures, but the scale shews it was intended to be forty feet. There is no scale, but the dimensions of the lot are marked, and by applying a scale to them the scale of the map is obtained. I did not measure the lots on the ground to ascertain whether they agreed with the plan. I measured the outside boundaries of block C, and the adjoining block D to the west of Niagara street, commencing at the south side of Welland Avenue, where it is intersected by the division line between lots 15 and 16. I found a stone monument planted which is recognised as the limit between these lots. These are township lots. I then measured on the south limit from Welland Avenue 4 chains 83 links, being the frontage of block C on Welland Avenue, which

extends to the east side of Niagara street, at that point. I then found another stone monument marking the southern limit of lots 15 and 16. I then ran a line between these monuments for the purpose of ascertaining the line between lots 15 and 16. I then measured along that line to ascertain the correct position of the north side of Academy street. I then ran along Academy street until it intersected Niagara street. There was a small surplus not exceeding fifteen inches between the actual measurement and the distance shewn on the plan. I then connected the two points, namely, this latter point and the one above mentioned, by a straight line. The stone monument first spoken of is a recognised monument. I did not take any evidence of its being so on the first occasion, but I had done so on previous occasions. I never took any evidence as to the second stone monument. I always heard it spoken of as correct. The survey was made before the arbitration. In making the survey I paid special attention to nothing but the plan.

The learned Judge at the trial, stated his opinion as follows :—

“Statement of what appears to me to be the question in dispute between the parties.

“The plaintiff, at the time when he signed the Exhibit No. 2,” (the agreement above referred) “was in possession of the land abutting on Niagara street, and, as he contends, agreed to give five feet east from the then boundary of the street, in order to widen the street. After the agreement was signed and given to the council the by-law was passed. After this had been done, Mr. Gardener, as city surveyor, altered what was at the time the agreement was signed the apparent western boundary of lot No. forty-one, contending that the true line was, say seven feet to the east of the then boundary, and having done this, widened Niagara street by taking in addition to these seven feet a further space of five feet, which the defendants claim they are entitled to under the agreement, making in all twelve feet across the front of the plaintiff’s lot. There was an arbitration between the defendants and certain other persons occupying lands on Niagara street,

to which the plaintiff was not a party. The plaintiff made no claim before the arbitrators, because he thought the defendants were taking the five feet which he had agreed to give. He first knew the defendants claimed the twelve feet in May of the year after the award was made. No demand was made by the plaintiff, either for compensation or arbitration, but this action was brought.

"It is admitted the foregoing statement is correct. Upon that being agreed to, I enter a verdict for the defendants, as, in my opinion, this action of ejectment to recover a portion of a public highway cannot be maintained, but the plaintiff must seek compensation in some other way. The counsel for the defendants states that if the Court will express an opinion that the plaintiff is entitled to compensation, steps will be at once taken by the defendants to arbitrate with him."

In Michaelmas Term, November 21, 1877, *M. C. Cameron*, Q. C., obtained a rule calling on the defendants to shew cause why the verdict for them should not be set aside, and a verdict be entered for the plaintiff, pursuant to the Law Reform and Administration of Justice Acts; or a new trial be had between the parties, the verdict being contrary to law and evidence.

In this term, February 8, 1878, *Osler* shewed cause. Ejectment will not lie for a highway:—*Regina v. Boulton*, 15 U. C. R. 272; *Corporation of Sarnia v. Great Western R. W. Co.*, 21 U. C. R. 59; *Fitzgibbon v. Corporation of Toronto*, 35 U. C. R. 137. The defendants took possession with the license of the plaintiff.

M. C. Cameron, Q. C., contra. The defendants had no license to take more than the five feet in width of the plaintiff's land measured from the then existing line of the street fence, and they have taken seven feet more under pretence that the true line of the street, as it should have been, covered these seven feet. But the plaintiff never assented to that. The defendants, by defending the action, assert they are in possession of the land.

March 15, 1878. WILSON, J.—I do not think it necessary to say anything about an ejectment lying or not lying for

a public highway, excepting that the owner of the soil may maintain such an action.

The land in question in this action, the whole twelve feet in width, has, as I understand, been held by the plaintiff and by those for whom he claims from nearly forty years without interruption.

It is said that the true easterly limit of Niagara street was seven feet in upon the plaintiff's land. Niagara street was, it appears, dedicated by the owners of the soil to the public. The public did not, however, take the land according to the true limits of the roadway, but took it just as it was used from the dedication up to the time the defendants took possession of the portion which was within the plaintiff's limits. If the owner of the land who dedicated the roadway had remained in possession of seven feet of it from the time of dedication up to the time when the defendants entered upon it, so that the public had neither accepted of the dedication of that seven feet, nor had ever claimed it for the long period of forty years, I think it could not be doubted that the public could not take that seven feet of land from the owner against his consent.

It is not necessary to say what the public might or could do if there had been unequivocal acts of acceptance, and then a subsequent encroachment made after the roadway had been so accepted.

That is not the state of things here. There is no evidence of acceptance by the public of more than the public actually used. And the occupation by the plaintiff and of those from whom he derived his title, enclosing and using as private property the seven feet in dispute, is almost conclusive evidence that the public did not accept that particular parcel. Once a highway always a highway, is no doubt a good and valuable maxim. But the question is, was there ever a highway over this parcel? The evidence, I think, does not shew there was.

It is claimed now only by drawing a straight line between two given points, and there is no evidence that such a line was ever laid out upon the ground, however it may have been upon the plan of the ground.

There is nothing therefore to prevent the plaintiff from recovering, by ejectment, the whole of the land taken from him by the defendants, less the five feet in width measured from the front of his land as the fence stood when the agreement was signed.

If the true line of roadway includes the seven feet of the plaintiff's land, and if the plaintiff could be obliged to give it up, I am of opinion he would be entitled to maintain the action for the five feet to the rear of the seven feet, simply because he never agreed to give the five feet to the rear of the seven feet, but the five feet next to the line fence, as the fence then stood.

We think the rule should be absolute to enter a verdict for the plaintiff for the rear seven feet which have been taken from him. But as the parties will no doubt arrange this matter by arbitration, we shall retain the rule until the first day of next Term, to enable such arrangement to be made.

The rule will not, however, be issued without the further leave of the Court.

HARRISON, C. J., and ARMOUR, J., concurred.

Rule accordingly.

ROBERTSON V. FURNESS ET AL.

Barrister and attorney—Security for future services—Validity of—Overdue note—Fraud.

The plaintiff who was a barrister and attorney having refused to defend one H., who had been arrested for embezzlement, in that and other matters, until satisfied as to his remuneration, agreed to do so on H.'s wife endorsing over to him an overdue note which H. had procured defendants to make to her, and on F., one of the defendants, admitting it to be all right and agreeing to pay it to plaintiff. Subsequently, and after plaintiff had performed some trifling services for H., defendants discovered that no value had been given for the note, but that it had been obtained by H.'s fraud, of which, however, the wife was ignorant, and they then notified the plaintiff that they did not acknowledge any liability thereon, and would not pay it. In an action by plaintiff against defendants on the note:

Held, that he could not recover, for that whether the note was received by plaintiff as security or as a payment in full for future services, the transaction was void as against public policy; and that this was a good defence available to the defendants under the plea that the plaintiff was not the lawful holder.

Held, also, that the plaintiff having become the holder after maturity could stand in no better position than the wife, who was bound by the fraud of her husband who acted as her agent in procuring the note to be made to her.

THIS was an action brought by the plaintiff as the holder of a promissory note dated 2nd August, 1876, for \$550, made by the defendants under the name and style of E. M. Furness & Son, payable to Jane Hope, or order, and by her endorsed to the plaintiff, payable at three months, with interest at seven and one-half per cent. per annum.

The defendant William Hope allowed judgment by *nil dicat*.

The remaining defendants pleaded:

1. Did not make the note.
2. That Jane Hope did not endorse the note to the plaintiff.
3. That the plaintiff was not the lawful holder.
4. Payment to Jane Hope before the maturity of the note, and while she was holder.
5. That Jane Hope endorsed the note to William Hope, and payment to William Hope before the maturity of the note, by making and delivering to him a certain other

promissory note, dated 30th September, 1876, made by the defendants to William Hope, for \$8,588.19 which he accepted in satisfaction of the note in the declaration mentioned.

6. That while Jane and William Hope were the holders of the note, and before maturity, William Hope received from the defendants for and on account of the promissory note sued on, and other moneys owing from the defendants to William Hope, a promissory note for \$12, 122. 44, dated 19th January, 1877, payable three years after date, which period had not elapsed before the commencement of this suit.

7. That the defendants were induced to make the note by the fraud of William Hope, who was and is the husband of Jane Hope, and acted as her agent in procuring the note, and the note was over due when endorsed to the plaintiff.

8. The sixth and seventh pleas were added at the trial.

The plaintiff took issue on the pleas.

Second replication to the fourth plea: that on 31st July, 1877, before the plaintiff became the holder of the note, the plaintiff presented the note to the defendants, and enquired of them whether the note was a good and valid outstanding security against the defendants, and the defendants answered the plaintiff that it was a good and valid outstanding security against the defendants.

To the fifth and sixth pleas, there was a similar replication of estoppel in *pais*.

Third replication to the sixth plea: that Jane Hope was married to the defendant William Hope, since 4th March, 1859, without any marriage contract or settlement, and the note was the separate property of Jane Hope.

The defendants joined issue on the special replications of the plaintiff.

Second rejoinder to the special replications: that the plaintiff is an attorney and barrister-at-law, and was retained by the defendant William Hope as his attorney and counsel to conduct his defence to certain charges of felony upon which he, William Hope, had been arrested, and was

then in custody; and thereupon Jane Hope, who was the wife of William Hope, endorsed and delivered the note to the plaintiff at the request and under the directions of William Hope, as a security for the costs to be incurred in and for his defence aforesaid; and the plaintiff gave no value for the promissory note, but always held the same on the terms aforesaid.

Third rejoinder to the second and third replications: that after the making by defendants of the representations in the replications mentioned, and before any value was given by the plaintiff for the promissory note, they informed the plaintiff that they were uncertain whether the said note was in fact a good and valid outstanding security against the defendants.

The plaintiff, for a surrejoinder, took issue on the special rejoinders.

The cause was tried before Galt, J., without a jury, at Hamilton, at the Fall Assizes of 1877.

The plaintiff was both a barrister and attorney-at-law. He proved the admission of the signature of the defendants and the endorsement in his presence by Jane Hope. William Hope had been arrested and sent to gaol on 27th July, 1877, for embezzlement, and required the services of an attorney and counsel for that and other matters. A messenger was sent from the gaol to the plaintiff to see William Hope in the gaol. The plaintiff refused to go with the messenger till assured that his, plaintiff's, services would be remunerated. The plaintiff accompanied the messenger to the gaol, and saw Hope. The plaintiff at once gave Hope to understand that he would not act professionally for him until he first knew who was "to satisfy him for his services." Hope said his wife held a note against E. M. Furness & Son for \$355, and that she would give it to the plaintiff if he would undertake his defence. The plaintiff said he would take it if all were right. The plaintiff then saw Mrs. Hope, and received the note from her, she endorsing it in his presence. Next morning the plaintiff received a message from William Hope to see him

at the police cells. The plaintiff attended. He found Hope engaged in conversation with a gentleman who he said was E. M. Furness. The plaintiff, after some conversation with Hope about the note, pulled it out of his pocket and said to Mr. Furness, "Mr. Furness, is that note all right? Is that the signature of your firm." Yes, he said, "that is the signature of our firm. It is all right, we will pay the note to Mrs. Hope." The plaintiff then said, "If the note is all right, you will not pay it to Mrs. Hope; I have undertaken to defend Mr. Hope, and Mrs. Hope has agreed to endorse the note to me." Mr. Furness said, "that is all right." This was followed by some conversation as to getting an extension of time for the payment of the note. The plaintiff swore that he took the note absolutely as payment for services contracted, and not simply as a security for future costs. It appeared that the note was overdue when delivered to the plaintiff.

Both of the defendants were called as witnesses for the defence. They proved that the only consideration for the note was an invoice of marble monuments from Messrs. Hurd & Roberts, dealers in marble, for \$555, which Hope, who was the book-keeper of Hurd & Roberts, as well as a partner in the defendants' firm, represented that he had paid to Hurd & Roberts, but which it turned out afterwards was not paid, but only appeared to be paid by a false entry to that effect made by Hope in the books of Hurd & Roberts.

Counsel for the defence then proposed to go into the account between E. M. Furness, Furness, sen., and Hope, so as to shew that as between these parties this note was wiped out by other and subsequent notes referred to in the pleadings, but the learned Judge refused to receive the evidence, unless it were shewn that Mrs. Hope was a party to these dealings.

Mrs. Hope was called as a witness, and proved that she had separate personal property of her own, and this note was received by her from her husband for money to that amount which, in August, 1876, she gave him to lend at 7

or $7\frac{1}{2}$ per cent. interest. She had no knowledge of the dealings between her husband and the defendants' firm independently of the note.

It was proved that after the plaintiff received the note, he prepared a bill in Chancery for Hope, defended two actions of replevin, and one in ejectment, and did everything necessary for the defence of Hope on the criminal charge, but notwithstanding Hope was convicted, and sentenced to the Penitentiary at Kingston, for a term of years.

The plaintiff, on or about the 7th August, 1877, received a letter from the defendants, in which they informed him that owing "to the confused state of affairs," they declined either "to pay the note, or in any manner acknowledge liability upon it."

Before the receipt of the note the plaintiff appeared to have performed some trifling service for Hope, such as attending once or twice for him at the Police Court. The bulk of the business transacted by the plaintiff for Hope, was done after the receipt of the letter of 7th August, 1877.

There was evidence that the money given by Mrs. Hope, in August, 1877, to be loaned by him, was in fact loaned by him to Messrs. Hurd & Roberts, and not to the defendants.

The learned Judge reserved his decision.

His subsequent finding was as follows:—

1. I find that the defendants did make the note in question.
2. I find that Jane Hope did endorse the same to the plaintiff.
3. I find that the plaintiff was the lawful holder.
4. I find that the defendants did not pay and satisfy the said note to Jane Hope.
5. I find that the said Jane Hope did not endorse the said note to the said William Hope.
6. I find that the said note was held by the said Jane Hope, and not by the said Jane Hope and William Hope.
7. I find that the said note was obtained from the defendants by the fraud of the said William Hope, and the

defendants never received any value for the said note ; but I find that the plaintiff took the note in good faith, and on the assurance of one of the defendants, Furness, that it was a valid note. I find that the said Jane Hope did not know that the note had been obtained by the fraud of her husband.

The learned Judge accordingly entered a verdict for the plaintiff for \$610.

In Michaelmas Term, December 5, 1877, *MacKelcan*, Q.C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a verdict entered for the defendants pursuant to the statute, upon the law and evidence ; and upon the ground that the note in the declaration was obtained by fraud, and that the plaintiff took it from the payee after it became due ; and also upon the ground that the note was taken by the plaintiff as attorney or counsel in payment of or as security for costs to accrue in respect of services to be rendered by him ; or why said verdict should not be set aside and a new trial granted between the parties, upon the ground of the erroneous rejection of evidence offered by the defendants in support of the fifth and sixth pleas.

In Hilary Term, February 19th, 1878, *C. Robinson*, Q. C., (*F. Beverley Robertson* with him) shewed cause, and cited : *Hope v. Caldwell*, 21 C. P. 41 ; *Robertson v. Caldwell*, 31 U. C. R. 402 ; *Jeffreys v. Evans*, 14 M. & W. 210 ; *Re Harris*, 13 M. & W. 3 ; *Sayer v. Wagstaff*, 5 Beav. 415 ; *Haigh v. Ousey*, 7 E. & B. 578 ; *Lindley on Partnership*, 3rd ed., 317, 318 ; *Bigelow on Estoppel*, 2nd ed., 425 ; *Perry v. Lawless*, 5 U. C. R. 514 ; *Pratt et al. v. Drake*, 17 U. C. R. 27 ; *Leach v. Buchanan*, 4 Esp. 426 ; Imp. Act, 33 & 34 Vic. ch. 28.

MacKelcan, Q. C., contra, cited *Parsons on Bills*, vol. i., pp. 78. 80, 87, vol. ii., p. 3 ; *Mason v. Morgan*, 2 A. & E. 30 ; *Barlow v. Bishop*, 3 Esp. 266 ; *S. C. 1 East* 433 ; *Rawlinson v. Stone*, 3 Wils. 5 ; *Connor v. Martin*, 1 Str. 516 ; *Darling v. Rice*, 1 App. 43 ; *Morris v. Bethell*, L. R. 5 C. P. 47 ; *Hope v. Caldwell*, 21 C. P. 41 ; *Robertson v. Caldwell*, 31 U. C. R. 402.

March 15, 1878. HARRISON, C. J., delivered the judgment of the Court.

The plaintiff is both a barrister and an attorney. He has the right therefore to contract as an attorney, subject to such rules as govern the conduct of attorneys in dealings with their clients.

In *Davis v. Hawke*, 4 Grant 394, it was asserted that the relation which subsists between attorney and client in this Province, bears little analogy to the relation which subsists between attorney and client in England; and it was argued that as the relation is essentially different, the principles upon which transactions between attorney and client are governed in England which grow out of that relationship, ought not to be applied here.

The Court, however, declined to accede to the argument, saying: "It is true, indeed, that the relation between attorney and client is of a much more intimate character in England than here; but the only conclusion fairly admissible from the admission is, that the necessity for a strict application of the principles of the Court may be more pressing in the one country than the other. But there is that in the very nature of the relation between attorney and client, even in its simplest form, which places the parties who stand in that relation upon an unequal footing and which necessitates consequently the application of the equitable principles to which I have adverted. So long as the law is administered to so large an extent, through the medium of a peculiar class, to whom important exclusive privileges are secured, it must be of vital importance to the interests of justice that the conduct of that class should be watched with jealous care. Dealings between attorney and client are not, and cannot with safety be placed upon the same footing as dealings between ordinary individuals."

It was not seriously denied that the bargain made between the plaintiff and William Hope was made by him otherwise than in the character of an attorney, but it was strenuously contended that such a bargain is not illegal in this Province.

If the plaintiff were an attorney only, it is clear that it would have been his duty, under such a bargain, to have retained counsel when the employment of counsel became necessary, and to have paid counsel when so retained: *Leslie v. Ball*, 22 U. C. R. 512; and that the fact of his being a barrister gives him no greater privileges *qua* attorney than if he were not a barrister: *Hope v. Caldwell*, 21 C. P. 241.

The question for our decision is, whether the bargain is, in this Province, a valid one, or whether it is void as being against public policy.

The promissory note was accepted by the plaintiff, either as security for future services, or as satisfaction or payment in bulk for such services.

The transaction is, in our opinion, in either view, void as being against public policy.

For a long time it was the law of England that an attorney could not take from his client a security for future services. It was so held by Lord Eldon in *Jones v. Tripp*, 1 Jacob 322; by Chief Baron Richards, in *Pitcher v. Rigby*, 9 Price 79; by Lord Cottenham in *Ex parte Laing*, 2 Mont. & Ayr. 381; by Lord St. Leonards, in *Uppington v. Bullen*, 2 Dru. & War. 184; by Lords Justices Knight Bruce and Turner, in *Re Foster*, 6 Jur. N. S. 687, and in other cases by other equity Judges of equal learning and eminence.

These and like decisions in equity have been followed in the Court of Equity in this Province: *Atkinson v. Gallagher*, 23 Grant 201; see further, *Re Geddes & Wilson*, 2 Ch. Ch. 447.

In *Atkinson v. Gallagher*, the learned Chancellor, at page 203, said: "It seems clear upon the authorities that a mortgage given by a client to his solicitor to secure costs yet to be incurred, is absolutely void as against public policy."

In a subsequent part of the same judgment on the same page, he said: "I think it will be found that no authority could be cited to sustain the proposition that a contract which is void as being contrary to public policy, (and which

I take to be in the same predicament as if it were in contravention of an express statute), can afterwards be capable of confirmation by the acts of the parties."

This rule formerly so strictly enforced in Courts of equity in England, and still so here is not however confined in its operation to Courts of equity. See *Jones et al. v. Hunter et al.*, 1 Dowl. P. C. 462; *Holdsworth v. Wakeman*, *Ib.* 523.

The Court of Common Pleas in this Province in *Hope v. Caldwell*, 21 C. P. 241, after a review of various cases on the point, decided that a security taken from a client by an attorney or counsel for future costs is invalid, and cannot be enforced by action at law.

Hagarty, C. J., in delivering judgment, said, at page 246 of the report: "The law therefore seems reasonably clear, that securities given for costs to be incurred by an attorney or counsel for his client, cannot be enforced."

Gwynne, J., in the same case, at page 250, said: "That an attorney cannot, according to the law of England, take a valid security from his client in respect of future services as an attorney, is a proposition which cannot admit of any question."

This case has been followed in this Court in *Robertson v. Caldwell*, 31 U. C. R. 402.

In England, by statute, an attorney may take security from his client for future services, the amount whereof must be ascertained by taxation, Imp. Statute, 33 & 34 Vic. ch. 28, sec. 16.

There is no corresponding statute in force in this Province.

By the law of this Province it is clear that if the note on which the plaintiff is suing is to be looked upon as a security for future costs, it cannot avail him.

We are of opinion that the note ought to be treated only as a security for future costs which, notwithstanding the acceptance of the security, should be taxed. But, assuming that the note was taken by the plaintiff as a satisfaction or payment in bulk for future services, his position would not, we think, be thereby improved.

Agreements entered into by a client with his attorney to pay him a bulk sum or a certain specified rate for business to be done, were at one time looked upon by the English Courts with great jealousy.

In *Drax v. Scroope*, 2 B. & Ad. 581, such an agreement was held not to be binding.

In *Re Whitcomb*, 8 Beav. 140, such an agreement was held to be binding as to past services, but even then, Lord Langdale, at p. 144, said: "An agreement like this between a solicitor and a client for taking a fixed sum in satisfaction of all demands for costs, is an agreement which may be perfectly good; but this Court, for the protection of parties, looks at every transaction of this kind with great suspicion."

In *Philby v. Hazle*, 8 C. B. N. S. 647, the Court held that an agreement to receive a gross sum and costs out of pocket in lieu of costs to be incurred, is an agreement manifestly contrary to the general policy of the law, and void.

Williams, J., there, at page 653, said: "The conclusion at which we have arrived substantially decides that such an agreement as this is void. * * * Notwithstanding the high respect I entertain for the learned Judge who decided the case of *Re Whitcombe*, 8 Beav. 140, I think such agreements are manifestly contrary to the general policy of the law."

Byles, J., in the same case, said: "The fair result of all the authorities is, that such agreements as the present between an attorney and his client are void."

Notwithstanding the emphatic language used by the learned Judges in this case, the authority of the case was somewhat qualified in *Scarth v. Rutland*, L. R. 1 C. P. 642, where Erle, C. J., said of it: "All that that case amounts to is, that, notwithstanding an agreement limiting the attorney's claim, he must deliver a bill, and the client may tax it, and on the result of such taxation the attorney may be entitled to less, but cannot recover more than the agreed sum."

Montague Smith, J., in the same case, said: "There is

nothing to prevent an attorney from cutting down his own claim."

The effect of qualifying the rule as suggested in *Scarth v. Rutland*, L. R. 1 C. P. 642, would be obviously to make the note in this case stand as a security for future services, subject to taxation—in other words, as void under the first class of cases to which we have referred.

The latest decision in England, before the change of the law in 1870, is *Re Brady*, 15 W. R. 632. It was decided by Lord Romilly, the Master of the Rolls, in 1867. It was an application to have a solicitor's bills taxed. It appeared that in 1864, Mr. Weston, the applicant, required a loan of £2,000, and applied to Mr. Brady, who was the solicitor for a Loan Society, to furnish the sum he required. Mr. Brady agreed that the Loan Society should provide the money upon condition that he should be employed as solicitor to Mr. Weston in the transaction, and that he should be paid the sum of £105 in lieu of costs. Lord Romilly held that the agreement to accept a sum beforehand was not legal, and that the only agreement sought to be established was an agreement of that character.

The English Statute which enables an attorney to take security for future costs, subject to taxation, also enables an attorney by agreement in writing to stipulate for a bulk sum for future services after examination and allowance of the agreement by a taxing officer of the Court: 33 & 34 Vic. ch. 28, sec. 4; see further *In re Attorney and Solicitor's Act*, 1870, L. R. 1 C. P. D. 573.

An agreement by an attorney with his client "to charge him nothing if he lost the action, and to take nothing for costs out of any money that might be awarded to him in such action," was held to be binding on the attorney, although not in writing: *Jennings v. Johnson*, L. R. 8 C. P. 425.

An agreement in writing, signed by the attorney only, is not an agreement in writing between the parties under the statute: *Re Lewis*, L. R. 1 Q. B. D. 724.

No such statute having been enacted by the Legislature

of this Province, the question now before us must be decided by the law as it was in England before the passing of such a statute.

The weight of authority is indubitably against the validity of the agreement in this case, whether we look upon the acceptance of the promissory note as a security or as a payment in bulk of future costs.

This entitles the defendants to the verdict on the rejoinder to the second, third, and fifth replications, and this disposes of these replications, including the replications of estoppel in favour of the defendants.

There is no demurrer to the rejoinder resisting this defence on the ground that it is one only available to the client and not to a third person; but even if there were such a demurrer, it would not, we think, benefit the plaintiff. The cases appear to shew that when the attorney is a plaintiff in a suit attempting to enforce payment of the security illegally obtained by him from his client, the person sued may set up the illegality as a defence, establishing as it does that the attorney has no legal right to hold the security. See *Simpson v. Lamb*, 7 E. & B. 84; *Radcliffe v. Anderson*, 1 E. B. & E. 806; *Hilton v. Woods*, L. R. 4 Eq. 439.

This view of the law entitles the defendants to a verdict on the plea that the plaintiff is not the lawful holder of the note.

Besides, we think the evidence substantially sustains the third rejoinder to the second and third replications, to the effect that after the making of the representations relied upon as an estoppel in *pais*, and before any value was given by the plaintiff for the promissory note, the defendants informed the plaintiff that they were uncertain whether the note was in fact a good and valid outstanding security against the defendants.

In either aspect arises the right of the defendants to rely upon their seventh plea, which is to the effect that they were induced to make the note by the fraud of William Hope, who was and is the husband of Jane Hope, and

acted as her agent in procuring the note to be made by the defendants, and that the note was overdue when the same was first endorsed to the plaintiff.

Every word of this plea is true according to the evidence, and therefore defendants are entitled to a verdict upon it.

The fact that Jane Hope did not know that the note had been obtained by the fraud of her husband, does not make any difference, for she cannot, according to the recent authorities, adopt the contract of her agent and seek to avoid responsibility for his fraud in the procuring of it: *Udell v. Atherton*, 7 H. & N. 172; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Swift v. Winterbottom*, L. R. 8 Q. B. 244; *Swift v. Jewsbury*, L. R. 9 Q. B. 301.

The plaintiff became the holder of the note after it was due, and is therefore in no better position as to title than Mrs. Hope from whom he received it.

The rule must be made absolute to enter a verdict for the defendants.

Rule absolute.

SHULTZ V. REDDICK.

Distress—Notice—Waiver—Damages.

Under 2 W. & M. sess. 1, ch. 5, goods distrained cannot be sold until the expiration of five days after a written notice of distress with the cause of the taking, shall have been given.

In this case the only notice was one given on the 8th February, and the sale took place on the 12th: *Held*, that the sale was invalid.

After the distress was made, on the tenant being informed by the bailiff that he had eight days in which to redeem, said, he did not require an inventory of the goods to be given him: *Held*, that this did not constitute a waiver of the notice of distress.

In an action for an illegal sale of goods distrained, the measure of damages is the difference between the actual value of the goods and the amount of the rent in arrear.

Lucas v. Tarleton, 3 H. & N. 116, 27 L. J. Ex. 246, distinguished.

ACTION on the case.

First count: trover. Second count: *trespass de bonis.*

Third count: distress and sale when no rent due. Fourth.

count : distress and sale without notice of the distress and of the taking having been given to the plaintiff, or left at his messuage, five days before the sale, contrary to the statute.

Pleas. 1. Not guilty, by statute 11 Geo. II. ch. 19, sec. 21.

2. To the third count : rent in arrear.

3. To the fourth count : performance.

Issue.

The cause was tried before Patterson, J.A., and a jury, at the last fall assizes for the County of Grey.

On the 1st of March, 1875, the defendant demised to the plaintiff the premises on which the distress was afterwards made, in the Township of Normanby, for a term of five years, from the first of April, 1875, at the annual rent of \$125, payable on the first day of April in each year during the term.

On the 24th of August, 1876, the plaintiff agreed by a deed, executed as well by the plaintiff as the defendant, to surrender and the defendant to accept the premises on or before the 1st of February, 1877, and that until such surrender there should be at all times sufficient distress to satisfy the current year's rent and taxes.

The defendant, on Friday, the 2nd February, 1877, delivered to Charles Boulding, a bailiff, a warrant of distress for \$104.17, being ten months' rent, due on the 1st of February, 1877.

On the same day the bailiff distrained on a span of horses, a waggon, a pair of bob-sleighs, a set of double harness, and a cultivator, belonging to the plaintiff, which he found on the premises.

The defendant, on the same or next day, accepted the promissory note of one York, at twenty days, for \$125, for the arrears of rent and expenses, and according to the plaintiff's testimony abandoned the distress.

On Wednesday, the 7th of February, the bailiff again took possession of the goods. Within half an hour afterwards the defendant and York appeared, the defendant

saying he intended to take a chattel mortgage on the things, and let York clear; the plaintiff assented. The defendant thereupon delivered the note to York, and told the bailiff to keep the things till the rent was paid. The defendant told the bailiff to give plaintiff an inventory or list of the goods seized. The bailiff told the plaintiff that he had eight days to raise the money. The plaintiff then said there was no use in a list of the things, as he knew what had been seized.

The plaintiff went to a place called Rockton, and raised the money, and returned on Tuesday, 13th February, only to discover that, in the meantime, the goods had been seized and sold, the landlord himself being the principal purchaser.

The bailiff told the plaintiff that he could get all his things back if he paid the rent, but this was apparently coupled with the condition that he should pay all the costs, amounting to more than \$22, which the plaintiff refused to pay.

The sale took place on Monday, the 12th of February.

The bailiff swore that on Thursday, the 8th of February, he put up a notice of the seizure and intended sale on the premises, and caused the things seized to be duly appraised.

The bailiff represented that there had not been any abandonment of the distress from the first, and had no recollection of the conversation about the chattel mortgage mentioned by the plaintiff.

The learned Judge, during the progress of the trial, held that if there was a second distress it was justified; but at the close of the case said the evidence shewed that proceedings on the first distress were only suspended.

To this ruling counsel for the plaintiff objected; and also objected that no sufficient notice of the sale had been given to satisfy the statute, and that the defendant was bound by the statement of the bailiff to the effect that the plaintiff had eight days after the 7th of February to raise the money and prevent the sale.

The learned Judge ruled that the defendant was not

responsible for the statement of the bailiff, and thought the plaintiff had by his conduct waived a written notice of sale; but said he would ask the jury what damage the plaintiff sustained by reason of the notice of the distress not having been in writing, reserving leave to the defendant to move to enter a verdict for him if the objection was not a good one.

Counsel for the plaintiff then objected that the sale could not legally take place till five days after the written notice, and, as it was not given till Thursday, the 8th of February, a sale on Monday, the 12th of February, was too soon; and as the plaintiff was prepared to pay the rent on Tuesday, the 13th of February, within the five days, the sale was illegal, and plaintiff entitled to recover the full value of the goods, less the amount of the rent in arrear.

The learned Judge thereupon decided to submit the question of value to the jury.

Evidence was then called as to the value on the part of the defence.

Two questions were at the close of the case submitted to the jury.

1. What damage did the plaintiff sustain for want of a written notice of the distress?
2. What was the value of the property sold?

The learned Judge did not make any note of his charge to the jury, but the charge, according to his note, was objected to because he did not tell the jury that the written notice not having been given five days before the sale, the sale was irregular and the damages to which the plaintiff was entitled was the value of the goods sold, less the amount of the rent, and did not tell the jury that they ought to take into consideration, in estimating the damages for want of a written notice, the conversation between the plaintiff and the bailiff about the inventory, and did not tell the jury that, although the notice was not required by law to be a notice of the time of sale, yet no sale could take place till five days after written notice; and that the landlord was responsible by reason of the bailiff having told the plaintiff that he had eight days to redeem.

The jury assessed the damages for the plaintiff at \$101, and found the value of the goods to be \$205.

The foreman of the jury, in answer to a question from the learned Judge as to the ground on which the damages were assessed, said the jury allowed the full value of the goods, less the amount of the rent.

The learned Judge then entered a verdict for the plaintiff for \$101.

During Michaelmas Term, November 21, 1878, *F. Osler* obtained a rule, calling on the plaintiff to shew cause why the verdict should not be set aside, and a verdict entered for the defendant, or a nonsuit, on the ground that the plaintiff recovered said verdict only by reason of a written notice of distress not having been delivered to him, and that he is prevented from setting up that ground because he dispensed with the service of such written notice, and accepted a verbal notice as sufficient; and on the ground that the verdict is against law and evidence, and on grounds taken at the trial by the defendant; or why the verdict should not be set aside, and a new trial had between the parties on the grounds aforesaid, and that the damages are excessive, and on the ground that no special damage was proved, and that the verdict is perverse.

During Hilary Term February 9, 1878, *Dunbar* shewed cause. It was a question for the jury, and not for the Judge, whether or not there was an abandonment of the first distress. It was also a question for the jury, and not for the Judge, whether there was any waiver on the part of the plaintiff of the notice which the statute makes necessary: *Davis v. Wright*, 2 A. & E. 623; *Kearslake v. Morgan*, 5 T. R. 513; *Lyness v. Sifton*, 13 C. P. 19. The sale did take place within five days of the giving of the notice, and so was irregular: *Robinson v. Waddington*, 13 Q. B. 753. The statute requires a notice in writing: *Wilson v. Nightingale*, 8 Q. B. 1034; and the damage is the difference between the value of the goods and the amount of the rent: *Biggins v. Goode*, 2 C. & J. 364; *Knight v. Egerton*, 7 Ex. 407; *Whitworth v. Maden*, 2 C. & K. 517.

Osler, contra. All that took place was one distress, and the learned Judge was right in deciding that there was no abandonment of it, and that the plaintiff, by his conduct, had waived the notice under the statute; but, whether or not, there was no proof of special damage so as to satisfy the statute, 11 Geo. II. ch. 19, sec. 19, and there can be no recovery except for nominal damages: *Lucas v. Tarleton*, 3 H. & N. 116.

March 15, 1878. HARRISON, C. J., delivered the judgment of the Court.

No question was raised at the trial as to the effect of the purchase by the landlord of the goods sold at his own sale for rent: See *King v. England*, 4 B. & S. 782; *Williams v. Grey*, 23 C. P. 561; *Burnham v. Waddell*, 28 C. P. 263.

The plaintiff in the fourth count of the declaration complains that, being a tenant of the defendant at a certain rent, payable by the plaintiff to the defendant, the defendant distrained divers goods of the plaintiff towards satisfaction of the rent, and afterwards sold the same without notice of the distress having been previously given to the plaintiff or left at the premises charged with the rent five days before the sale, contrary to the statute, &c.

Until the passing of the statute, 2 W. & M. sess. 1, ch. 5, intituled, "An Act for enabling the sale of goods distrained for rent in case the rent be not paid in a reasonable time," the landlord who distrained for rent could only enforce payment of the rent by detention of the distress, and had no power against the will of the tenant to sell the same for the purpose of paying the rent.

For the remedy of this state of things the statute, according to its preamble, was passed. It enacts that from and after the 1st day of June, 1690, where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not within five days next after such distress taken and notice

thereof (with the cause of such taking), left at the chief mansion house or other most notorious place on the premises charged with the rent, replevy the same, &c., that then in such case, after such distress and notice as aforesaid and expiration of the said five days, the person distraining shall and may, &c., cause the goods and chattels so distrained to be appraised, &c., and after such appraisement shall and may lawfully sell, &c.

The power to sell is conferred subject to the conditions that there shall be the notice, the expiration of the five days after the notice, and the appraisement which the statute directs.

The notice must be in writing: *Wilson v. Nightingale*, 8 Q. B. 1034.—The five days must be calculated exclusively of the day of taking: *Robinson v. Waddington*, 13 Q. B. 753—and there must be two appraisers reasonably competent: *Allen v. Flicker*, 10 A. & E. 640; *Roden v. Eyton*, 6 C. B. 427.

If there be a sale otherwise than subject to these conditions the sale is irregular, and the tenant whose goods are sold has a remedy by action of some kind: *Wallace v. King*, 1 H. Bl. 13. See further *Pitt v. Shaw*, 4 B. & Al. 208.

If it were not for the provisions of statute 11 Geo. II. ch. 19, sec. 19, subsequently passed the remedy would be trespass, and the measure of damages the full value of the goods sold.

That statute enacts, that from and after the 24th of June, 1838, where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her or their agents, the distress itself shall not be deemed to be unlawful, nor the party nor parties making it be therefore deemed a trespasser or trespassers *ab initio*, but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they shall have sustained thereby, and no more, in any action of trespass, or on the case, at the election of the plaintiff or plaintiffs.

Trespass must be brought, if the irregularity be in the nature of an act of trespass, and case if it be in itself the subject matter of an action on the case: *Messing v. Kemble*, 2 Camp. 115; *Winterbourne v. Morgan*, 11 East 395; but whichever form of action be adopted the recovery shall only be for the special damage sustained.

The measure of damages in an action for selling goods distrained for rent, without complying with the provisions of 2 W. & M. sess. 1, ch. 5, where the goods sold in real value exceed the amount of rent in arrear, is the real value of the goods less the amount of rent in arrear: *Biggins v. Goode*, 2 C. & J. 364; *Knotts v. Curtis*, 5 C. & P. 322; *Whitworth v. Maden*, 2 C. & K. 517; *Knight v. Egerton*, 7 Ex. 407.

Where the goods sell for their full value, and are of less value or no greater value than the amount of the rent, it is obvious that the tenant has suffered no damage by the sale, and, in such a case, cannot recover substantial damages: *Proudlove v. Twemlow*, 1 C. & M. 326, 329.

The case of *Lucas v. Tarleton*, 3 H. & N. 116, relied upon as an authority to the contrary, is a very peculiar case, and not in point here.

It is reported, not only in 3 H. & N. 116, but in 27 L. J. Ex. 246.

It does not appear from the report in 3 H. & N. 116, that the goods sold were of any greater value than the amount of the rent. Although this does appear in 27 L. J. Ex. 246, it also appears there that the tenant at the time of the sale was neither ready nor willing to pay the rent, and had no excuse for not paying it. In neither report is any mention made of the cases to which we have referred, decided under the statute as to the measure of damages. From both reports it would appear that the plaintiff insisted mainly for recovery on a count which he had in the declaration for an excessive distress.

The case, as a decision, rests on the authority of *Rodgers v. Parker*, 18 C. B. 112. When we turn to that case we find that it did not contain any count for selling contrary to

the provisions of the statute of William & Mary, and that the corn, the subject matter of the distress, "sold for its full value."

The damages awarded in the case before us were, in our opinion, estimated on a correct principle, and if the plaintiff is entitled to recover, are not excessive.

The only *written* notice of the distress given by the bailiff was on Thursday, 8th February. The sale took place on Monday, 12th February. Excluding the day on which the notice was given, it is clear that there were not five days between the notice and the sale, but on the contrary a sale within the five days after the notice.

Whether the plaintiff had waived it or not was, we apprehend, a question of fact for the jury on the evidence. But, even if a question for the Court, we do not think that the plaintiff, by his conduct, had waived the giving of the five days written notice of distress. He was told by the bailiff that he would have eight days to redeem. Having been told so he did not insist upon having a list or inventory of the goods distrained given to him. This, at most, was only evidence of a waiver of the receipt of a list or inventory of the goods distrained. But the statute requires more to be given, that is, a notice of the distress with the cause of the taking: See *Kerby v. Harding*, 6 Ex. 234, 240, 241. The evidence fails to indicate that any such notice as this was given before Thursday, 8th February, within five days appointed for the sale.

The extraordinary power which a landlord has not only to distrain but to sell the goods of his tenant, or even of a stranger upon the premises, for rent, is one which ought to be strictly pursued. The statute which gives the power subjects it to certain checks designed for the protection of the tenant against oppression.

So long as this power is permitted to exist, the tenant should have the full benefit of every provision which the Legislature has created for his benefit. If the landlord or his bailiff, notwithstanding the positive language of the statute, sees fit to disregard its provisions under pretence

that the tenant has waived them, the landlord must be prepared to establish clearly such facts as amount to a waiver. The landlord in this case has, in our opinion, failed to do so, and has been rightly subjected to damages, which damages have been, in our opinion, rightly assessed.

Rule discharged.

REGINA v. LAWRENCE.

Conviction—Inducing witness to absent himself—Power of Local Legislature—R. S. O. ch. 181, secs. 57, 59—Amendment of conviction.

By section 57 of R. S. O., ch. 181, The Liquor License Act, any person who in any prosecution under the Act tampers with a witness either before or after he is summoned or appears as such witness on any trial or proceeding under the Act, or by the offer of money or by threats, or in any other way induces or attempts to induce any such person to absent himself, or swear falsely, shall be guilty of an offence under the Act, and liable to a penalty of \$50; and by section 59 such penalty is recoverable in default of distress by imprisonment not exceeding thirty days.

Held, affirming the judgment of GWYNNE J., that this was *ultra vires* of the Local Legislature, for the acts declared by section 57 to be offences were criminal offences at common law, and within the exclusive jurisdiction of the Dominion Legislature, and were not brought within the Local Legislature by sub-section 15 of section 92 of the B. N. A. Act, either as coming under municipal institutions, or as being enactments to enforce the law as to shop, saloon, &c., licenses, in order to raise a revenue for provincial, local, or municipal purposes.

A conviction, therefore, under the Act for inducing a witness to absent himself, &c., was quashed.

Quære, per GWYNNE, J., whether under section 77 a conviction imposing an unauthorized sentence, such as imprisonment at hard labour, could be amended on motion to quash by striking out the words "with hard labour."

THIS was a motion to quash a conviction, whereby one Richard Lawrence, upon the 10th January, 1878, was convicted before the Police Magistrate of the City of Toronto,

for that he, the said Richard Lawrence, on the 21st of October, 1877, at the City of Toronto, in the County of York, in a certain prosecution under the liquor license Acts, unlawfully did induce Robert Douglas and Albert Pothoff, witnesses in such prosecution, to absent themselves; and the said Richard Lawrence, for his said offence, was adjudged to forfeit and pay the sum of \$50, to be paid and applied according to law, and if the said sum should not be paid forthwith the same was ordered to be levied by distress and sale of the goods and chattels of the said Richard Lawrence; and in default of sufficient distress, the magistrate adjudged the said Richard Lawrence to be imprisoned in the common jail of the said City of Toronto, *and there to be kept at hard labour* for the space of thirty days, unless the said several sums and all costs and charges of the said distress, and of the commitment and conveying of the said Richard Lawrence to the said jail, should be sooner paid.

The objections taken to the conviction were :

1. That the sentence to confinement at hard labour for thirty days in default of fine being levied was void.

2. That the information disclosed no offence, not stating by what means the witnesses were induced to absent themselves.

3. That the tampering with a witness is a crime, independently of the local Act, ch. 181, sec. 67, Revised Statutes, under which the conviction took place, and that, therefore, proceedings should have been taken under the Dominion Statute.

4. That the Act under which conviction was had, namely, sec. 57 of ch. 181 of the Revised Statutes, is *ultra vires* of the Local Legislature, inasmuch as it professes to enact proceedings and punishment in respect of what was already a crime—or declares that to be a crime and punishable in an exceptional manner which was not a crime before, and in either case is *ultra vires*.

5. That there was no sworn information upon which the charge was entertained, and that the information was bad

for uncertainty, in not disclosing whether the offence against the Liquor License Act was a sale in licensed premises, or a sale without any license, and that the information, if it discloses anything, discloses an offence at common law, over which the convicting magistrate had no jurisdiction to adjudicate.

Upon motion for the *certiorari*, *Fenton*, County Crown Attorney, shewed cause in first instance.

Blackstock, contra.

GWYNNE, J.—As to the first objection, it was answered that the conviction might be amended now by striking out the words, ‘*at hard labour*,’ under sec. 77 of ch. 181.

As to the 2nd objection, that the information followed the form given in the Schedule to the ch. 181.

As to the 3rd and 4th objections, that the Act under which the conviction took place is within the jurisdiction of the Local Legislature under sec. 92, sub-secs. 9 and 15 of the British North America Act, citing *Regina v. Boardman*, 30 U. C. R. 553.

And as to the 5th objection, that the Act, ch. 182, sec. 65, authorizes the complaints to be made upon information without oath.

Sec. 77 of ch. 181 of the Revised Statutes is the 23rd sec. of 40 Vic. ch. 18, O. That statute, after reciting 37 Vic. ch. 32, O., and 39 Vic. ch. 26, O., made divers amendments in several of the clauses of those Acts; and then by sec. 23 enacted that: “No conviction,” &c., “under the said recited Acts, or this Act, shall be held insufficient or invalid by reason of any variance between the information or conviction, or by reason of any other defect in form or substance, provided it can be understood from such conviction,” &c., “that the same was made for an offence against some provision of the said Act, within the jurisdiction of the Justices or Police Magistrate who made or signed the same, and provided there is evidence to prove such offence,

and it can be understood from such conviction," &c., "that the appropriate penalty or punishment for such offence was intended to be thereby adjudged. And upon any application to quash such conviction," &c., "whether in appeal or upon *habeas corpus*, or by way of *certiorari* or otherwise, the Court or Judge to which such appeal is made or to which such application has been made upon *habeas corpus* or by way of *certiorari* or otherwise, shall dispose of such appeal or application upon the merits, notwithstanding any such variance or defect as aforesaid; and in all cases where it appears that the merits have been tried and that the conviction," &c., "is sufficient and valid under this section or otherwise, such conviction," &c., "shall be affirmed, or shall not be quashed, (as the case may be,) and such Court or Judge may in any case amend the same, if necessary; and any conviction," &c., "so affirmed, or affirmed and amended, shall be enforced in the same manner as convictions affirmed on appeal."

I confess it seems to me to be very difficult to hold the true construction of this section to be that, in case a person should be convicted of an offence named in the Acts, and should by the conviction be sentenced to imprisonment and hard labour, such sentence in the particular case not being authorized by law, and in case such person after, it may be, undergoing part of such illegal sentence, should apply for his discharge upon *habeas corpus*, or to quash the conviction, the Judge who hears such application should amend the conviction and not quash it. I should have great difficulty in applying the section,—that is to say, I should have great difficulty *in understanding from the conviction itself*, which awarded an illegal sentence, *that the appropriate* penalty or punishment for the offence was what was intended to be adjudged by the illegal sentence; but in a case like this before me, where, as I understand, no warrant of commitment has issued following the conviction, notwithstanding that cause has been shewn by Mr. Fenton in the first instance, I think the better course will be for me to order the *certiorari* to issue, when the magis-

trate may possibly return a conviction omitting the objectionable words "at hard labour"; and then the argument already had as to the other objection, which assails the jurisdiction of the magistrate, and which constitutes the main point raised, can be taken as offered by Mr. Fenton in the first instance upon the motion to quash the conviction when returned on the *certiorari*, and the parties may rehear the case *in banc* this present term, if so advised.

This course having been agreed to was adopted and a *certiorari* issued, upon which a conviction was returned similar in every respect to the one set out above, save that the words "at hard labour" were not in it.

Blackstock then moved to quash the conviction, to which *Fenton* shewed cause in first instance, referring to his former argument.

February 22, 1878. GWYNNE, J.—The power of the Local Legislature to pass any law inflicting punishment upon any person for the commission of any act of the nature of a crime is to be found in the 15th sub-sec. of the 92nd sec. of the British North America Act, by which it is enacted that the Legislature in each Province may make laws in relation to the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in the 92nd sec.

In the 9th sub-section, which is the one with which we have to deal here, we find the Local Legislature empowered to make laws in relation to shop, saloon, tavern, auctioneer, and other licenses, *in order to the raising of a revenue* for provincial, local, and municipal purposes.

Taking these two sub-sections together, the result appears to be, that in order to the raising of revenue for provincial, local, or municipal purposes, the Legislature may pass laws imposing a fee or duty for tavern and other licenses; and for enforcing such law they shall also have power to impose punishment by fine, penalty, or imprisonment.

Now what is the legitimate construction of the term, "*for enforcing*" a law relating to tavern and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes? The object of the law is the raising of revenue. *In order to the raising of a revenue*, the Legislature may pass a law imposing a fee to be paid for tavern and other licenses. For enforcing this law—that is to say, as it appears to me, for enforcing obedience to this law—the Legislature may prohibit the sale of spirituous liquors otherwise than is prescribed in the license or authorized by the law; and for any violation of the terms of such license, or of the law regulating the granting licenses, the law may impose a fine, penalty, or imprisonment, thereby *enforcing* obedience to it.

Now the 57th and 59th secs. of ch. 181 of the Revised Statutes, which are the 42nd and 43rd secs. of 37 Vic. ch. 32, and which, together with the 65th sec. of ch. 181, identical with the 21st sec. of 40 Vic. ch. 18, are the clauses relied upon as supporting this conviction, enact that "Any person who on any prosecution under this Act tampers with a witness, either before or after he is summoned or appears as such witness on any trial or proceeding under this Act, or by the offer of money or by threats or in any other way, either directly or indirectly, induces or attempts to induce any such person to *absent himself*, or to swear falsely, shall be liable to a penalty of \$50 for each offence: 37 Vic. ch. 32, sec. 42; and if the fine be not paid, and no sufficient distress is found to satisfy the conviction, then it shall be lawful for the justices or police magistrate to order that the person so convicted be imprisoned in any common gaol, &c., within the county, &c., for any period not exceeding thirty days, unless the penalty and all costs are sooner paid: 37 Vic. ch. 32, sec. 43.

And by 40 Vic. ch. 18, sec. 21, it is enacted that all informations or complaints for the prosecution of any offence against any of the provisions of this Act, or of the Acts thereby amended, including 37 Vic. ch. 32, shall be laid or made in writing, &c., but may be made without any

oath or affirmation to the truth thereof, and the same may be according to a form given in a schedule to the Act.

Now dissuading a witness from appearing and giving evidence on an indictment for any offence is a misdemeanor at common law: *Rex v. Lawley*, 2 Stra. 904.

In 2 *Chitty's*, Criminal Law, 235, a form of indictment is given in such case, where it is also said that the mere attempt to stifle evidence is criminal though the persuasion should not succeed, on the general principle now fully established, that an incitement to commit any crime is itself criminal.

In 1 *Russell on Crimes*, 5th ed., 361, the law is laid down thus: "All who endeavour to stifle the truth, and prevent the due execution of justice, are highly punishable; and therefore the dissuading or endeavouring to dissuade a witness from giving evidence against a person indicted is an offence at common law, though the persuasion should not succeed." And in 3 *Russell on Crimes*, p. 1: Inciting a witness to give *particular* evidence, where the inciter does not know whether it is true or false, is a high misdemeanor indictable at common law; citing *Rex v. Edwards*, decided in 1764.

In *Rex v. Higgins*, 2 East 5, 18, it is laid down that an attempt to commit a misdemeanor is itself a misdemeanor; So where an indictment charged a defendant with *an attempt* to suborn one to commit perjury, it was unanimously holden by all the Judges to be a misdemeanor; and in *Johnson's Case*, there cited from 2 Show. 1, the offence said to have been charged was, tampering with a witness before trial to give evidence for a corrupt consideration, which was held to be an offence against public justice. And in such a case, namely, inciting another to commit a misdemeanor, it is not necessary to aver that anything was done in pursuance of the incitement: 2 East 19. The rule as laid down there, 2 East 21, is, all offences of a public nature—that is, all such acts as tend to the prejudice of the community—are indictable.

Now, granting that the Local Legislature has authority

to pass a law imposing a duty for tavern and other licenses, and imposing a fine for selling liquor without paying such duty, or contrary to the terms and conditions of a license thereupon granted, or for a licensed person selling at prohibited hours, and assuming it also to have authority to give to a single magistrate jurisdiction to hear and determine any prosecution for such offence without a jury, and to impose a fine upon conviction, then the magistrate's Court being so made the competent tribunal to hear and determine the charge, it seems to me to be as much to the prejudice of the community and as derogatory to the due administration of public justice, that a witness should be tampered with and induced to absent himself, and not to give evidence upon such a prosecution, as it would be to do the like upon an indictment for any offence being a misdemeanor at common law or made so by statute; and unless there be a distinction between such a prosecution and an indictment for an indictable offence, the tampering with the witness and the inducing or attempting to induce him to absent himself and not give evidence, is equally in either case an indictable offence at common law.

The result seems to be that what is pointed at by the 57th sec. of ch. 181 of the Revised Statutes down to and including the words "*absent himself*," was either an offence at common law and indictable as such, wholly independently of that section, or else that section professes to make that to be a crime and punishable as such which before was not a crime; and, at any rate, there can be no doubt that the adding the words "*or to swear falsely*," in the same section, to the words "*absent himself*," made the whole section deal with a common law offence, viz., subornation of perjury in respect of a matter before a tribunal *ex concessis* competent to entertain the charge; to receive evidence upon oath and adjudicate thereupon.

The clause then dealing with an offence clearly indictable at common law—subornation of perjury—was *ultra vires* of the Local Legislature, unless the clause, although dealing with what would be a misdemeanor at common

law, is brought within the jurisdiction of the Local Legislature, by sub-section 15 of section 92 of the British North America Act, that is to say, unless clause 57 of ch. 181 of the Revised Statutes, can be held to be a clause relating to the imposition of punishment by fine, penalty, or imprisonment *for enforcing* the law respecting the sale of spirituous liquors, and the raising of revenue for provincial, local, or municipal purposes, by the granting of licenses authorizing and regulating such sale.

Now can a clause, professing to punish a person for inducing, or attempting to induce by bribery or threats, a witness not to give evidence, or to give false evidence upon a prosecution, although it be a prosecution for an offence against the Liquor License Act, be regarded as a clause within the meaning of the 15th sub-section of the 92nd sec. of the British North America Act, *for enforcing* the Act for regulating the sale of liquors.

In my judgment it cannot. The provision in the 57th section is made in relation to an offence wholly collateral to the prosecution for a violation of the Liquor License Act. That prosecution may be said to be *for enforcing* the law, but a clause for punishment of subornation of perjury committed by persons it may be utter strangers to any license, and in no way guilty of violating any of the provisions relating to licenses or the sale of liquors, can in no sense be said to be a clause *for enforcing* obedience to the law relating to the sale of spirituous liquors, or regulating the licenses issued therefor; that is a matter affecting the due administration of justice, in which the community at large is interested. It is a clause which in fact professes to provide a Court and procedure wherein and whereby in a particular case a person guilty of an offence indictable at common law may be tried and convicted, contrary to the course of the common law or of the criminal statute law in like cases. It affects to alter the procedure in a criminal case in a very marked degree, and affects to compel a person charged with subornation of perjury in a prosecution under the Liquor License Act

to submit to the jurisdiction of a single magistrate, without any information upon oath being laid, and to be tried and sentenced to fine and imprisonment without the intervention of any jury, and against the will of the accused. The Local Legislature has no more power, as it appears to me, so to interfere with the procedure in a charge of subornation of perjury committed, or attempted to be committed, in one case any more than in another, or to deprive the subject of his constitutional rights when accused of such an offence, whether the offence be charged to have been committed in connection with a prosecution instituted for enforcing the Liquor License Act or in any other matter. Clause 57, therefore, of ch. 181 of the Revised Statutes, appears to me to be *ultra vires* of the Local Legislature, and to be an encroachment upon the jurisdiction of the Dominion Parliament.

The conviction therefore, which is rested solely upon that section and section 65, must, as it seems to me, be quashed.

Conviction quashed.

In this term, February 22, 1878, *Fenton* obtained a rule *nisi* by way of appeal from the above judgment.

During the same term, February 23, 1878, *Blackstock*, shewed cause.

Fenton, contra.

March 15, 1878. HARRISON, C. J., delivered the judgment of the Court.

Trial by jury is, by the common law of England, the acknowledged right of every person accused of crime.

The course of proceeding in a criminal trial is of great antiquity, and, although from time to time improved and simplified, is substantially the same now as it was centuries since.

The Legislature has from time to time dispensed with

trial by jury, substituting trial before magistrates, or other similar functionaries, where the offences charged are not of a very serious character, or where it is the desire of the accused to waive trial by jury; and in such cases have changed the procedure to that ordinarily in use before magistrates, or a procedure somewhat resembling it; but all such changes are jealously watched.

It is important that the law of a country as to crime and criminal procedure shall be uniform, so that the rights of all citizens shall be, as much as possible, equally respected, and the public wrongs of any citizen, as much as possible, equally punished.

The Imperial Legislature when uniting the colonies now forming the Canadian Confederation, were influenced by these considerations, for it expressly declared in the B. N. A. Act that one of the subjects exclusively entrusted to the general Parliament, or Parliament of the Dominion, shall be "the criminal law," including "the procedure in criminal matters": Sec. 91, sub-sec. 27.

It is supposed that to this there is an exception in that part of the same Act, which enables a Provincial Parliament to pass laws for the imposition by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects entrusted exclusively to the Provincial Legislatures: Sec. 92, sub-sec. 15; but this, when closely examined, will not be found to be so much an exception as the creation of a new rule not necessarily in conflict with the complete exercise of the Dominion powers.

While two legislative bodies exist, each having distinct and exclusive legislative powers, there must be care exercised by each to avoid encroachment by either body upon the exclusive powers of the other, and this must be prevented by the Courts, whether the encroachment assume the guise of an honest neutral, or the garb of an aggressive enemy.

It never could have been the design of the Imperial Legislature, as manifested by the language which it has

used in the B. N. A. Act, to permit any legislative body, under pretence of exercising only its own exclusive legislative powers, to cover ground which, in truth, by the constitution belongs to another.

The whole domain of crime and criminal procedure is the exclusive property of the Dominion Parliament, and to allow the Parliament of a Province to declare that an act, which, by the general law, is a crime, triable and punishable as a crime with the ordinary safeguards of the constitution affecting procedure as to crime, shall be something other than or less than a crime, and so triable before and punishable by magistrates, as if not a crime, would be destructive of the checks provided by the general law for the constitutional liberty of the subject.

There are many acts not being crimes which are triable before and punishable by magistrates, which, although called offences, are not crimes, and which by the proper legislative authority may be made the subject of summary magisterial jurisdiction, either with or without appeal, but these are not to be mistaken for acts in themselves, crimes, and the subject of indictment and of conviction under indictment, either at the common law or by statute. Such acts as these may by the Provincial Legislature be made the subject of punishment by fine, penalty, or imprisonment, when this is done for the purpose of enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects exclusively assigned to the Provincial Legislatures.

One of the subjects exclusively assigned to the Provincial Legislatures is the right to make laws as to "Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes."

Where the purpose of the provincial statute is not to raise a revenue for any such purpose, but to suppress some public vice, even by the sacrifice of revenue, the Act is not one which can be validly passed under the words which we have quoted, and unless held to be the exercise of mere police or municipal power, is void.

Where the effect of such a statute is to interfere with the trade and commerce of the Dominion, it is a direct encroachment upon the powers which exclusively belong to the Dominion or general Parliament of the country: Sec. 91, sub-sec. 2.

The Legislature of the Province of Ontario have passed, among the Revised Statutes of the Province, "An Act respecting the sale of fermented or spirituous liquors." It prohibits sales without licenses, makes provision for the issue of licenses, for a revenue to be derived by the issue of licenses, for the regulation of persons licensed, and for the punishment of persons violating particular provisions of the Act which are intended to be for the enforcement of the Act: See secs. 39, 40, 43, 44, 45, 47, 51, and 53, of the Act.

All prosecutions for the punishment of any offence against any of the provisions of these sections, or any section of the Act, for the contravention of which a penalty or punishment is prescribed by sec. 51, whether the prosecution is for the recovery of a penalty or for punishment by imprisonment, may take place before any two or more Justices of the Peace: Sec. 68.

All prosecutions under the Act, other than those mentioned in the preceding section, whether for the recovery of a penalty or otherwise, may be brought and heard before any one or more of Her Majesty's Justices of the Peace Sec. 69.

Among the prosecutions covered by the last section is the one now before us, and which depends for its validity upon the constitutionality of sec. 57 of the Act.

This section is as follows: "Any person who, on any prosecution under this Act, tampers with a witness, either before or after he is summoned, or appears as such witness on any trial or proceeding under this Act, or by the offer of money, or by threats, or in any other way either directly or indirectly induces or attempts to induce any such person to absent himself, or to swear falsely, shall be liable to a penalty of \$50 for each offence."

The constitutionality of this clause is called in question, because it is affirmed, that the acts with which it deals are and each of them is the subject of an indictment by the criminal law, and so not the subject of the exercise of power by the Provincial Legislature.

If this contention be well founded in fact, we are of opinion that it is a good contention in law.

No effort was made to sustain the clause under the power of the Provincial Legislature to make laws as to municipal institutions in the Province (British North America Act, sec. 92, sub-sec. 8), probably because it does not appear in the Municipal Act (ch. 180); and, whether or not, we are of opinion any such attempt would be futile.

By the criminal law it is clear that every step towards a misdemeanor by an act done is itself a misdemeanor: *Regina v. Chapman*, 1 Den. C. C. 432; and this whether the offence was created by statute or was an offence at the common law: *Rex v. Butler*, 6 C. & P. 368; *Rex v. Cartwright*, R. & R. C. C. 107; *Rex v. Roderick*, 7 C. & P. 795.

Subornation of perjury is a crime independently of statute, but is expressly made so by 32 & 33 Vic. ch. 23, sec. 1, D.

He who endeavours to stifle the truth and prevent the due execution of justice, is punishable as a criminal: *Hawke*, P. C., 8th ed., book i., ch. 6, sec. 15, p. 64. So he who dissuades, or endeavours to dissuade, a witness from giving evidence against a person indicted: *Ib.*

This is the law according to 1 *Russell* on Crimes, 5th ed., p. 361; *Stevens's* Digest of Criminal Law, 97; and 1 *Bishop's* Criminal Law, 6th ed., sec. 468.

The form of the indictment for dissuading a witness from giving evidence against a person indicted, will be found in 2 *Chitty's* Criminal Law, p. 235.

One test would be whether under the law which rendered a witness incompetent on the ground of infamy:—*Com. Dig. Testmoigne*, A. 4—A person convicted of tampering with a witness, either before or after he is summoned or

appears as such witness on any trial or proceeding before magistrates, or who by the offer of money, or by threats, or in any other way directly or indirectly induces, or attempts to induce, such person to absent himself or swear falsely, would be rejected as infamous.

The rule was, that it was the crime, and not the punishment which made the person infamous and incompetent as a witness: *Pendock v. Mackender*, 2 Wils. 18; *Priddle's Case*, 1 Leach 442. Persons convicted of the following offences have been held infamous: Petit larceny: *Pendock v. Mackender*, 2 Wils. 18; conspiracy: *Rex v. Priddle*, 1 Leach 442; and tampering with a witness: *Clancey's Case*, Fort. 208.

Clancey's Case, Fort. 208, contains some observations of value in this case. The point arose in this manner. Upon a debate in the House of Lords, on the 15th of December, 1696, relating to the bill for attainting Sir John Fenwick of high treason, the opinion of all the Judges then present was asked whether one Clancey, who had been convicted of the misdemeanor of actually giving one George Porter 300 guineas and promising more to withdraw himself into France, thereby to prevent his further evidence against Sir John Fenwick and others, might be admitted as a witness. And it was adjudged that Clancey was incompetent, "for his crime was a base and clandestine endeavour to obstruct the public justice of the kingdom, not by discoursing or arguing with a witness, or endeavouring to convince him with reason, but by downright bribery and corrupting him with money, which no man would attempt but a base mean and infamous rascal."

This case was in 1826 followed in *Bushel et al. v. Barrett*, R. & M. 434, where the person offered as a witness, together with another person, had been previously convicted of persuading and hindering a witness from appearing on a prosecution before magistrates under the excise law, and fined £200.

Bushel et al. v. Barrett, R. & M. 434, is noticed in *State v. Keys*, 8 Verm. 57.

The latter has since been followed in *State v. Carpenter*, 20 Verm. 1, where it was held that an attempt, whether successful or not, to obstruct the administration of justice by preventing the attendance of witnesses bound to appear and testify before a grand jury, is a substantial offence, punishable at common law.

The defendant, in *Rex v. Johnson*, 2 Show. 1, was indicted and convicted of an attempt to suborn a witness to prove a deed false, and according to the pathetic language of the reporter, "broke his heart, and died soon after."

The defendant, in *Rex v. Lawley*, 2 Stra. 904, was convicted "for attempting to persuade a witness to appear and give evidence against Japhet Crooke, for forgery," and was fined "three hundred marks, and to suffer one month's imprisonment."

It may be argued that the crime only exists at common law where the trial at which the witness was to have given evidence is a trial in one of the superior Courts, and not simply before a magistrate.

While this distinction, for peculiar reasons inapplicable here, exists where the charge is for compounding an offence: see *Rex v. Crisp*, 1 B. & Al. 282, *Rex v. Mason*, 17 C. P. 534, it does not appear to apply when the offence is that of tampering with a witness.

In *Bushel et al. v. Barrett*, R. & M. 434, where the offence was, as already mentioned, for tampering with a witness summoned to give evidence before magistrates, Gasalee, J., after consulting with Littledale, J., said, at p. 435: "The essence of the offence of which the witness is convicted is the attempt to prevent the course of justice, and that by corrupting a witness. The *magnitude* of the judicial proceeding which it is attempted to obstruct is immaterial. The attempt to prevent is the same whether it be on a charge of high treason or a misdemeanor."

We are of opinion that the acts declared to be offences under sec. 57 of the Liquor License Act of Ontario, were before the passing of that Act criminal offences at the common law, and so not within the power of a Provincial

Legislature, either as coming under "Municipal Institutions" or under the pretence of being passed to enforce a law as to shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial local, or municipal purposes.

We therefore concur with the opinion of Mr. Justice Gwynne, in holding that sec. 57 of the Liquor Licenses Act of Ontario is *ultra vires*, and that a conviction had under it must be quashed.

Judgment affirmed.

REGINA V. JAMES BLACK.

Conviction—Second offence—Imposition of fine and imprisonment at hard labour—Amendment—37 Vic. ch. 32, sec. 34, O., 40 Vic. ch. 18, sec. 23, O.

A conviction for selling liquor during the time prohibited by the License Act, alleging that it was for a second offence, imposed upon the defendant a penalty of \$40, and in default of sufficient distress ordered the defendant to be imprisoned in the county jail at hard labour for ten days.

Held, that under 37 Vic. ch. 32, sec. 34, R. S. O. ch. 181, sec. 52, the previous offence need not be against the same license, but may be against a license granted for a previous year; but

Held, also, that the conviction was invalid, as the Act only authorized the alternative of fine or imprisonment as a substantive punishment for the second offence, but gave no power to imprison at hard labour for non-payment of the fine.

Held, also, that the Court would not amend the conviction under 40 Vic. ch. 18, sec. 23, R. S. O. ch. 181, sec. 77, as it could not, under the circumstances, say that any other punishment was intended by the Justices.

Quære, as to the meaning of a power to fine "not less than \$40."

Quære, also, whether under B. N. A. Act, sec. 92, sub-sec. 14, the Provincial Legislature has power to impose imprisonment at hard labour.

DURING Michaelmas Term last, December 8, 1877, *J. R. Roaf* obtained a rule from Mr. Justice Gwynne, sitting for

the full Court, returnable, by the direction of Mr. Justice Armour, before the full Court, calling upon John Ferguson, George H. Grierson, and Francis Rae, to shew cause why the conviction, dated 13th August, 1877, returned into this Court in obedience to a writ of *certiorari* issued for that purpose, should not be quashed, on the following, among other grounds:—

1. The conviction is bad in law.
2. The conviction is for a second offence, while there is no evidence of a previous conviction.
3. The conviction is for a second offence, while the prior conviction or offence, if any, was committed under a former license to sell liquor.
4. The information is not sufficient to support a conviction for a second offence.
5. The information charging a second offence cannot support a conviction for a first offence.
6. The conviction suspends and remits the penalty, which the justices had no power to do.
7. The conviction is in the alternative as to the penalty of fine or imprisonment.
8. The conviction imposes a penalty not provided for or allowed by the Act respecting the sale of spirituous liquors.
9. The conviction imposes imprisonment with hard labour in default of payment of a fine.

The conviction was as follows:—

“Canada,

“Province of Ontario,

“County of Ontario.

“To wit:

“Be it remembered that on the 13th August, 1877, at the village of Oshawa, in the said county of Ontario, James Black is convicted before the undersigned, George Hamilton Grierson, and Francis Rae, two of Her Majesty's justices of the peace in and for the said county, for that he, the said James Black, on 28th July, 1877, at the village of Oshawa, in the said county, in his premises, being a place where liquor may be sold, unlawfully did sell liquor during the time prohibited by the Liquor License Acts for the sale of the same, without any requisition for medicinal purposes

as required by the said Acts being produced by the vendee or his agent, John Ferguson, of the town of Whitby, in the said county, license inspector for the south riding of the county of Ontario, being the informant. And it appearing to us that the said James Black was previously, to wit, on 15th November, 1876, at the village of Oshawa, in the said county, before us, the said George Hamilton Grierson, and Francis Rae, two of Her Majesty's justices of the peace for the said county, duly convicted of having on 11th November, 1876, at the village of Oshawa, in the said county, in his premises, being a place where liquor may be sold, unlawfully sold liquor during the time prohibited by the Liquor License Acts for the sale of the same, without any requisition," &c., (as before.) "And we adjudge the said James Black for his said offence to forfeit and pay the sum of \$40, to be paid and applied according to law, and also to pay the said John Ferguson the sum of \$2, for his costs in this behalf; and if the said several sums be not paid forthwith, or on or before 1st September, 1877, we order the said sums to be levied by distress and sale of the goods and chattels of the said James Black, and in default of sufficient distress in that behalf, we adjudge the said James Black to be imprisoned in the common gaol of the said county, at Whitby, in the said county of Ontario, and there kept at hard labour for the space of ten days, unless the said several sums and all costs and charges of the said distress, and of the commitment and conveying of the said James Black to the said gaol, shall be sooner paid.

"Given," &c.

(Signed) "G. H. GRIERSON, J. P. [L.S.]

" "FRANCIS RAE, J. P. [L.S.]"

The information of John Ferguson, which was sworn on 4th August, 1877, alleged the belief of the deponent that James Black, on Saturday night, 28th July, 1877, at the village of Oshawa, &c., in his premises, being a place where liquor may be sold, unlawfully did sell liquor during the time prohibited by the Liquor License Acts for the sale of the same, without any requisition, &c., and that this was the second offence.

The note which the justices made of their judgment at the time was as follows:—

"Said James Black having appeared before us this day, pleaded guilty to the charge, and was adjudged by us, as

and for his second offence, now established before us, to pay a fine of \$40 and costs forthwith, or in default to imprisonment in the common gaol of the county of Ontario for the period of ten days at hard labour."

It was dated 13th August, 1877, at Oshawa, and signed by the convicting justices.

During this term, February 16, 1878, *Reeve*, shewed cause, and cited *Regina v. French*, 34 U. C. R. 403; *Regina v. Cavanagh*, 27 C. P. 537; *Regina v. Strachan*, 20 C. P. 182, 188; *Regina v. Vine*, L. R. 10 Q. B. 195; *Ex parte Short*, L. R. 5 Q. B. 174.

Roaf, contra.

March 15, 1878. HARRISON, C. J., delivered the judgment of the Court.

The questions argued before us were substantially three.

1. Whether the conviction in 1877 can be said to be for a second offence, the prior conviction having been made in 1876, when the defendant sold under a former license?

2. Whether the conviction, imposing as it does hard labour in default of the payment of a fine and costs, is valid?

3. Whether, if defective, the Court, instead of quashing the conviction, should so amend it as to make a valid conviction?

The Liquor License Act in force when the conviction was made was 37 Vic. ch. 32, O., as amended by 40 Vic. ch. 18, O.

These are now to be found in Rev. Stat. O. ch. 181; and our references, for the sake of convenience, shall be to the existing Act, instead of the repealed Acts.

No person, with some exceptions, is permitted to sell any spirituous, fermented, or other manufactured liquors without having first obtained a license under the Act: Sec. 39.

The punishment for the first offence is a penalty of not less than \$20, besides costs, and not more than \$50, besides

costs; and for the second offence imprisonment at hard labour for a period not exceeding three calendar months: Sec. 51.

It is incumbent for the accused, when prosecuted for selling without a license, to prove his license, if he be licensed: Sec. 85.

The appeal for a conviction for selling without license is only allowed to be made to the Judge of the County Court without a jury: Sec. 71.

Before the issue of a license the person applying for the same is required to enter into a bond with Her Majesty, with two good and sufficient sureties, in the sum of \$200 each, conditioned "for the payment of all fines and penalties such person may be condemned to pay for any offence against any Act, by-law or provision in the nature of law relative to taverns or houses of public entertainment," &c.: Sec. 22.

Licenses when issued are dated of the 1st day of May in each year, and continue in force one year, expiring on 30th April in the next ensuing year: Sec. 7.

Provision is made in certain cases for the License Commissioners by resolution extending the duration of an existing license for any specified period, not exceeding three months: Sec. 18.

No sale or other disposal of intoxicating liquors is, with a few exceptions, allowed to take place in places where intoxicating liquors are sold from or after the hour of 7 o'clock on Saturday night till 6 o'clock on Monday morning thereafter: Sec. 43.

The punishment for the first offence is a fine of not less than \$20 with costs, or fifteen days imprisonment with hard labour; for the second offence, not less than \$40 with costs, or twenty days imprisonment with hard labour; for the third offence, not less than \$100 with costs, or fifty days' imprisonment with hard labour; and for a fourth, or any after offence, a penalty of not less than one nor more than three months' imprisonment: Sec. 52.

The duty of the justices is, in the first instance, to enquire

concerning the subsequent offence only, and if the accused be found guilty thereof, he shall then and not before be asked whether he was previously convicted as alleged in the information. If he admit the previous conviction he may be forthwith sentenced. If he deny it, stand mute, or do not answer directly to the question, it becomes the duty of the justice to enquire concerning the first conviction. The number of previous convictions is provable by a certificate under the hand of the convicting justice or clerk of the peace, without proof of signature or official character. A conviction may be had in any case for the first offence, notwithstanding there may have been a prior conviction for the same or any other offence. Convictions for several offences may be made, although such offences may have been committed on the same day; but the increased penalty or punishment is only recoverable in the case of offences committed on different days, and after information laid for a first offence. Power is given to the justice to amend a second or subsequent conviction in case of the previous conviction being set aside, quashed, or rendered void: Sec. 73.

The occupant is personally liable to these penalties and punishments, notwithstanding the sale, barter, or traffic, be made by some other person who cannot be proved to have done so under or by directions of the occupant: Sec. 83.

The appeal is not restricted to the County Judge, but may be to the Court of General Quarter Sessions of the Peace: Secs. 71, 72.

The County Judge upon complaint that any person has been convicted on three several occasions of any violation of any of the provisions of the Act, "whether the offences in respect of which such convictions were made were the same or different in their character," so long as such convictions were for offences committed on different days, may enquire into the matter and decide that the license ought to be revoked; and the person to whom the license was issued shall thereafter, during the full period of two years,

be disqualified from obtaining any further or other license under the Act : Sec. 62.

If it be made to appear to justices that the person licensed "sanctions or allows gambling, or riotous or disorderly conduct" in his tavern or house, the license may be suspended or annulled, and in the event of the license being annulled, the person whose license is annulled is not eligible to obtain a license for two years thereafter : Sec. 53.

Any person licensed, who knowingly harbours or entertains any constable during any part of the time appointed for his being on duty, may be deprived of his license : Sec. 54.

It is the duty of every officer, policeman, constable, or inspector of licenses "to see that the several provisions of the Act are observed," and that prosecutions be instituted for the punishment of offences against the Act : Sec. 97.

Any penalty in money recovered under the Act in cases in which the inspector is the prosecutor must be paid to the inspector : Sec. 35, 60.

All moneys received by the inspector for fines and penalties form a license fund, which is to be applied as directed in the Act : Sec. 34.

No police magistrate or justice of the peace, license commissioner, or inspector, or municipal council, or municipal officer has power to remit, suspend, or compromise any penalty or punishment inflicted under the Act : Sec. 58.

For the recovery of penalties and costs the justice may issue a warrant of distress to any constable or peace officer against the goods and chattels of the person convicted ; and in case no sufficient distress be found to satisfy the conviction, where not otherwise provided for by the Act, the justice may order the person convicted to be imprisoned for any period not exceeding thirty days unless the penalty and all costs are sooner paid : Sec. 59.

It appears to us that offences under sec. 43 of the Act are not simply offences against the license issued for a particular year, but offences against the Act and the social order which that section of the Act is intended to enforce.

The punishment for such offences is not merely under particular circumstances the revocation of the license, but in all cases fine or imprisonment, or imprisonment alone.

This unequivocally indicates on the part of the Legislature an intention to punish the offences under section 43, as offences against public order.

This being so, whether the several offences are committed on several days in the same year, or on different days in different years, the offences are still against social order and still against law, and must still be classed as first, second, third, and fourth, according to the time of their commission. See *Ex parte Short*, L. R. 5 Q. B. 174 ; *Regina v. Vine*, L. R. 10 Q. B. 195.

It is the duty of those who are authorized to issue licenses to inform themselves of the fitness of the person who makes application for a license, and for this purpose it may be found necessary to ascertain something of his previous history.

If upon enquiry it be found that the applicant is a person who year after year habitually violated the provisions of the Liquor License Act, it is to be presumed that his application for a license will not be successful.

But, even if successful, the fact that he has succeeded where he ought not to have succeeded, is no reason why his repeated violations of the law against social order, in whatever year or years committed, should not be visited by the increased penalties or punishments designed for such an offender.

The person who for the first time offends is to be more lightly dealt with than the person who offends for a second, third, or fourth time. But where the person offends so often that he becomes a hardened offender, the effluxion of his license for a particular year cannot restore to him his good character, or make him a good citizen.

We are therefore of opinion, so far as the first objection argued is concerned, that the conviction is valid.

The second objection is one of a much more serious description.

The conviction imposes upon the defendant the pecuniary

penalty of \$40 ; and, in default of sufficient distress, orders the defendant "to be imprisoned in the county gaol, and there kept at hard labour for the space of ten days."

The power of imprisoning is generally given, either as an original punishment, or as the means of enforcing payment of a pecuniary fine. See *Re Slater and Wells*, 9 U. C. L. J. 21 ; *Re Greystock and Municipality of Otonabee*, 12 U. C. R. 458, 462: and in regard to offences cognizable by summary jurisdiction, is derived solely from competent legislative authority : *Paley on Convictions*, 5th ed., 315.

Statutes which provide for the summary trial of offenders, and for fine or imprisonment when convicted, are strictly construed—See *Regina v. Barton*, 13 Q. B. 389—and this is in favour of the constitutional liberty of the subject, one of the boasts, and certainly the glory, of the British Constitution.

This constitutional liberty, which is not only the boast of our race but the admiration of the civilized world, has been bought at a great price, and cannot be too sacredly guarded by those to whom is entrusted the administration of criminal justice.

The statute under which the conviction took place authorizes a penalty of \$20 with costs, or fifteen days with hard labour, for the first offence ; a penalty of not less than \$40, with costs, or fifty days' imprisonment at hard labour, for the second offence ; and a penalty of not less than \$100, with costs, or fifty days' imprisonment, for the third offence ; and three months' imprisonment at hard labour for the fourth offence : 37 Vic. ch. 32, sec. 34, sec. 52 of Revised Act, ch. 181.

The effect of the enactment is to leave it in the discretion of the convicting justice for either the first, second, or third offence to impose a fine or imprisonment as a substantive punishment, and imprisonment only as the substantive punishment for the fourth offence, and the imprisonment authorized when the original or substantive punishment may, according to the Act, be at hard labour. But where the justice, in the exercise of discretion, sees fit to

impose a fine, where either a fine or imprisonment may be imposed, there is, in our opinion, no power to imprison at hard labour for non-payment of the fine.

Where, in the judgment of the convicting justice, a fine only is an appropriate punishment, it is by section 59 of the Act (section 43 of the old Act), made the duty of the convicting justice to issue a warrant of distress to any constable or peace officer against the goods and chattels of the person so convicted; and in case no sufficient distress be found to satisfy the conviction, then the justice may order the person so convicted to be imprisoned in the common gaol for any period not exceeding thirty days, "unless the penalty and all costs be sooner paid."

The ninth objection taken by the rule to the conviction is therefore fatal, and the conviction must be quashed, unless we have power to amend it, and do amend it by striking out the words "at hard labour."

The Legislature of Ontario have recently endeavoured to be most liberal in conferring powers of amendment on Courts to whom applications are made to quash convictions under the Liquor License Act, and we must now refer to the language of the Act conferring these powers.

It is enacted by section 77 of the Act, that no conviction or warrant enforcing the same or other process or proceeding under this Act shall be held insufficient or invalid by reason of any variance between the information or conviction, or by reason of any *other* defect in form or *substance*, provided it can be understood from such conviction, warrant, process, or proceeding, that the same was made for an offence against some provision of the said acts within the jurisdiction of the justices or police magistrate who made or signed the same.

And provided there is evidence to prove such offence, and it can be understood *from such conviction*, warrant, or process, that *the* appropriate penalty or punishment for such offence was intended to be thereby adjudged.

Sub-sec. 2: "Upon any application to quash such con-

viction, or warrant enforcing the same, or other process or proceeding, whether in appeal or upon *habeas corpus*, or by way of *certiorari* or otherwise, the Court or Judge to which such appeal is made, or to which such application has been made upon *habeas corpus*, or by way of *certiorari*, or otherwise, shall dispose of such appeal or application *upon the merits*, notwithstanding any such variance or defect as aforesaid ; and in all cases where it appears that *the merits have been tried*, and that the conviction, warrant, process or proceeding is sufficient and valid under this section or otherwise, such conviction, warrant, process, or proceeding shall be affirmed, or shall not be quashed (as the case may be), and such Court or Judge may, in any case, *amend the same if necessary*, and any conviction, warrant, process, or proceeding so affirmed, or affirmed and amended, shall be enforced in the same manner as convictions affirmed on appeal, and the costs thereof shall be recoverable as if originally awarded."

The second part of the section is dependent to a great extent for its operation upon the first part, and flows from it. The duty is to dispose of the application upon the merits, "notwithstanding any such variance or defect as aforesaid." Where it appears that "the merits have been tried and that the conviction is valid under this section, or otherwise," the Court is authorized to amend the same, if necessary. It is not easy to understand the necessity of amending a valid conviction. What is meant is, that the conviction may be made valid by amendment, where on the facts there ought to be a valid conviction. The power to amend, however, appears to be under the first part of the section, and subject to the limitations there provided.

We infer from reading the section as a whole, that the power to amend in the case of a conviction moved against is to be exercised by the Court only when the Court is able to understand from the conviction that the appropriate penalty or punishment for the offence was intended thereby to be adjudged.

Where there may be fine or imprisonment in the discretion of the convicting justice, either is *an* appropriate

punishment, but the Court cannot decide that either is *the* appropriate punishment.

Where, in the discretion of the convicting justice, the fine or the imprisonment may be less or more within defined limits, we cannot decide that a fine or imprisonment adjudged by the conviction without the limits is an appropriate punishment, nor can we decide that a given sum of money or given term of imprisonment within the prescribed limits, is *the* appropriate punishment.

Much in such cases is left to the discretion of the convicting justice, who, by reason of his local knowledge, must be more competent to decide as to the "appropriate" penalty than any Court seized of the case on an application to quash the conviction for illegality.

Besides, where that discretion has been exercised, and the result of it appears on the face of the conviction, it is impossible for the Court to decide "from such conviction" that any *other* punishment was intended.

The presumption is, that a justice intends the punishment which he imposes, and this must be assumed to be his idea of the appropriate punishment; and as we are not allowed to look outside of the conviction for what he intended, we must, in the case of the exercise of discretionary power by a justice, leave the conviction bad or good, as we find it, and deal with it accordingly.

The only power which the justices here had under section 52 to imprison as a substantive punishment for the second offence, was "for twenty days" at hard labour. The conviction moved against awards imprisonment at hard labour "for ten days."

If imprisonment were the only mode of punishing the offence, we might in such a case be asked to amend the conviction by substituting "twenty" for "ten" days; but how would we know that the justice intended twenty and not ten days imprisonment at hard labour for the person convicted.

Where there is the discretion not only to imprison for at least twenty days at hard labour, but to fine not less than \$40, the difficulty in the way of amending the conviction is increased, for it may be that owing to the ill-health or

other condition of the accused, the justice would have preferred to have imposed a moderate fine rather than imprisonment at hard labour for so long a period as twenty days.

Then what is meant by fining a man "not less than \$40"? Does this mean that he may be fined *any*, and, if any, what amount *above* \$40? Does it intend that for a second offence the offender may be fined \$100, when the fine for the third offence is "not less than \$100"?

Whether we look at the imprisonment or the fine authorized by the section under which this conviction took place, it is impossible for us to decide with anything like certainty what is *the* appropriate punishment intended, and this being so, we cannot amend.

Besides, the power of amendment should be sparingly exercised where a conviction adjudges imprisonment at hard labour under a statute of the Province which apparently authorizes that mode of punishment.

The question whether the Imperial Legislature which, by the B. N. A. Act, has entrusted to the Dominion Legislature the exclusive power to make laws as to "criminal law" and "procedure in criminal matters" meant, under the words, "The imposition of punishment by fine, penalty, or *imprisonment* for enforcing any law of the Province," &c., as used in sec. 92, sub-sec. 14, to confer on the Provincial Legislature power to imprison at *hard labour* is one upon which we have considerable doubt, but are not called upon at present to decide the point.

It may be when the point arises that the decision of this Court in *Regina v. Boardman*, 30 U. C. R. 553, decided shortly after the Confederation Act, which apparently affirms the power of Provincial Legislatures to authorize imprisonment at hard labour, will demand reconsideration in the light of more recent decisions. See *Regina v. Roddy*, 41 U. C. R. 553:

We have no alternative but to make the rule absolute to quash the conviction now before us as illegal.

Conviction quashed.

KIDD V. O'CONNOR.

Ca. sa.—Order for—Reviewal of in term—Application for discharge from custody—Property—Meaning of

Held, on an application by way of appeal from a Judge's order for the issue of a writ of *ca. sa.*, that the Court in term has power to review such order; but *semble* that an application made after the lapse of the succeeding term is too late.

Held, on the merits, that the order in this case ought not to be interfered with, as it sufficiently appeared from the affidavits before the Judge that the defendant had parted with his property or had made some secret or fraudulent disposal thereof to prevent its being taken in execution; and *semble*, that the affidavits also shewed that unless immediately apprehended defendant was about to quit Canada with intent to defraud his creditors.

Held, also, that "property" in Consol. Stat. U. C. ch. 24, sec. 12, refers to personal as well as real property.

Held, also, that an application to discharge a defendant from custody under section 31 of the Act, lies only when the arrest is under mesne process, and not where he is in custody under final process.

On Saturday, 1st December, 1877, *F. Osler*, upon reading the affidavits and papers filed, including the plaintiff's affidavit filed in Chambers on the motion for the order for a writ of *capias ad satisfaciendum* issued in this cause, obtained from Gwynne, J., sitting for the Court, a rule calling on the plaintiff to shew cause [why the order for the arrest of the defendant herein by Wilson, J., and the writ of *ca. sa.* issued thereon, and the arrest of the defendant thereunder, should not be set aside, on the ground that the affidavit filed on the motion for the said order does not shew any, or any sufficient, ground to warrant the said Judge in making the said order;] or why the defendant should not be discharged out of custody under the said writ of *capias ad satisfaciendum*.

The rule was on 8th February, 1878, by permission of Gwynne, J., sitting for the Court, amended by the insertion of the words in brackets, but without prejudice to any objection that might be made to the lateness of that part of the application, and the learned Judge thereupon directed the rule to be argued before the full Court in Hilary Term last.

The order for the issue of the writ of *capias ad satis-*

faciendum was made by Wilson, J., sitting as a Judge in Chambers, on 18th October, 1877.

The only affidavit on which the order was made was that of the plaintiff, sworn on the 16th October, 1877. In it he swore that on the 4th October, 1877, he recovered a judgment against the defendant for \$1,821.43 damages, and \$174.21 costs taxed: that thereupon he caused a writ of execution to be issued against the goods and chattels of the defendant, who was then a resident of the county of Huron; that under the writ the sheriff of the county of Huron levied \$826.20 parcel thereof, and returned *nulla bona* as to the residue: that the defendant had not any other goods or chattels, or any lands, out of which the remainder of the demand could be levied: that from the first of May, 1876, to the 2nd of June, 1877, the defendant, as the hired servant of the plaintiff, conducted the business of a liquor dealer in the town of Seaforth, and during that time, under plaintiff's directions, had the control and management of the business, and in that capacity received and collected for the plaintiff divers large sums of money—the proceeds of the business, which large sums of money the defendant fraudulently withholds from the plaintiff and retains in his own custody and possession, and refuses to pay to the plaintiff, although requested so to do: that before defendant received and collected said large sums of money the plaintiff gave him notice in writing not to collect or receive the same: that the defendant has in his custody or under his control the said large sums of money, and fraudulently withholds the same from plaintiff, and they cannot be reached by means of an ordinary execution: that on the 2nd of June, 1877, the plaintiff sold to the defendant the said liquor business, and the stock of liquor therein contained, for the sum of \$2,560, payable in three, six, and nine months from the 4th of June, 1877: that after the date of the sale, and after certain payments had been made on account of the purchase money, and after the defendant had obtained possession of nearly all the stock, he repudiated the purchase and refused to sign

the notes which were to be given for the said payments, and thereupon this action was brought and judgment recovered for the price of the said goods: that from the 4th June, 1877, until the 4th October, 1877, the defendant was in possession of the said liquor store and the stock therein contained, and sold the said stock to the extent of over \$1,700, and collected in cash the proceeds of the said stock to the extent of over \$1,400, and paid no portion thereof to the plaintiff, and that the defendant appropriated to his own use the whole of the said sum.

The affidavit then stated the belief of the deponent that the defendant had still in his possession the larger portion of the said sum, and fraudulently refused to pay the plaintiff the same or any part thereof.

The affidavit further stated that there were still outstanding accounts the proceeds of sales made by the defendant, and that the defendant was endeavouring to collect the same, and unless arrested would collect the same and appropriate it to his own use.

The concluding paragraphs of the affidavit were as follows:—

13. That the defendant has no other means, that I am aware of, with which to pay the said residue of the said judgment; but I verily believe that he has money enough in his custody and possession to pay the whole of the said residue or within his control.

14. That the said moneys so held and retained by the defendant are moneys that belong to me, or are the proceeds of the sale of my own goods, sold by me to the defendant on the said second day of June now last past.

15. That I am informed, and verily believe the fact to be so, that the defendant has no other means out of which I can collect the said residue of the said judgment, and that he has no particular ties to bind him to Canada, and I verily believe, if I instituted any proceedings against the defendant to examine him *viva voce* touching his estate and effects, that, before I could get any order against him, he would abscond from this province of Ontario.

16. That the household furniture of the defendant was seized by the said sheriff, and claimed by the wife of the defendant.

17. That there is good and probable cause for believing that the defendant, unless he be forthwith apprehended, is about to quit Canada with intent to defraud me of the residue of the said judgment.

18. That from the foregoing and other facts I verily believe that the defendant hath made some fraudulent conveyance of his property—namely, the said moneys—and fraudulently retains and withholds the same from me in order to prevent its being taken in execution.

During Hilary Term, February 20, 1878, *S. Richards*, Q.C., shewed cause.

F. Osler, contra.

March 15, 1878. HARRISON, C. J., delivered the judgment of the Court.

The statute under which the order moved against was made was Consol. Stat. U. C. ch. 24, sec. 12.

It, among other things, enacted that, "If the plaintiff in the action by the affidavit of himself or some other party, shews to the satisfaction of a Judge of either of the said Superior Courts of common law, &c., that he has recovered judgment against the defendant for the sum of \$100 or upwards exclusive of costs, and also by affidavit shews such facts and circumstances as satisfy the Judge that there is good and probable cause for believing, *either* that the defendant, unless he be forthwith apprehended, is about to quit Canada with intent to defraud his creditors generally, or the said plaintiff in particular, or that the defendant hath parted with his property or made some secret or fraudulent conveyance thereof in order to prevent its being taken in execution, such Judge may by a special order direct that a *capias ad satisfaciendum* may be issued," &c.

It therefore appears that the writ is to be issued in a

cause pending in Court, that it can only be issued on an affidavit which discloses facts and circumstances sufficient to satisfy the Judge that the one alternative mentioned in the statute is likely to take place unless the debtor be forthwith apprehended, or that the other alternative has taken place; and this may be the affidavit of the plaintiff, or any other party.

If the Judge be satisfied that the debtor, unless he be forthwith apprehended, is about to quit Canada, with intent to defraud, &c., or that the defendant hath parted with his property, or made some secret or fraudulent conveyance thereof, &c., the order may be made for the issue of the writ.

Here there was a cause pending in this Court; there was an application of the plaintiff for a writ of *ca. sa.* in that cause, supported by his own affidavit, which affidavit disclosed facts and circumstances sufficient to satisfy the Judge to whom the application was made of one or other of the alternatives provided in the statute, and such Judge, thereupon, made the order asked.

It is sought to rescind the order on the alleged ground that the affidavit filed on the motion for the order does not shew any, or any sufficient, ground to warrant the Judge in making the order.

The answers on the part of the plaintiff to the present application, are:

1. That there can be no appeal to the Court from the decision of the Judge under the statute.
2. That, if there may be, the present application is too late.
3. That, if not too late, the affidavit must be held sufficient for the purposes of the statute.

Where a statute gives power to one of the Judges of a Superior Court to make an order in a cause or matter not pending in one of the Superior Courts of law, the decision of such Judge, in the absence of language in the statute giving the appeal, is not subject to be appealed to the Court: *Graham v. Connell*, 1 L. M. & P. 438; *Beswick v.*

Boffey, 9 Ex. 315; *In re Cobbett*, 4 H. & N. 452. See further, *Owen v. The London and North-Western R. W. Co.*, L. R. 3 Q. B. 54; *In re Sandback Charity Trustees and The North Staffordshire R. W. Co.*, L. R. 3 Q. B. D. 1.

Where the cause or matter is pending in one of the Superior Courts, and the Judge in making the order may, in view of the nature of the proceeding authorized or power invoked, be looked upon as the deputy of the Court, the Court has, without language to that effect being used in the statute, a general control over all proceedings in causes and matters pending in the Court, and this must be held to include orders made by a Judge for the issue of process in any such cause or matter: See *Rex v. Meyer*, 5 Dowl. P. C. 686; *Talbot v. Bulkeley*, 16 M. & W. 193; *Kilkenny and Great Southern, &c., R. W. Co. v. Feilden*, 6 Ex. 82, note; *Brown v. Riddell*, 13 C. P. 453; *In re Allen et al.*, 31 U. C. R. 458; but also *Shaw v. Nickerson*, 7 U. C. R. 541, and *Manufacturers and Merchants Fire Ins. Co. v. Atwood*, 28 C. P. 21.

It is not usual for the Court on appeal to interfere with the exercise of discretion by a Judge when the statute does not prescribe limits for the exercise of the discretion, or where the statutable limits, if prescribed, have been observed: See *Tadman v. Wood*, 4 A. & E. 1011; *Lane v. Newman*, 10 Jur. Q. B. 925; *Hargreaves v. Hayes*, 5 E. & B. 272; *Schneider v. Shrubsole*, 9 L. T. N. S. 526; *Anon.* 12 Grant 51; *McDonell v. McKay*, 2 Ch. Chamb. 243; *Chard v. Meyers*, 3 Ch. Chamb. 120; *Re Lawden's Estate*, 19 W. R. 371; *Republic of Peru v. Ruzo*, 22 W. R. 358; *Ohlsen v. Terrero*, 23 W. R. 195; *Sheffield v. Sheffield*, L. R. 10 Ch. 206; *Dunn v. McLean*, 6 P. R. 156; *Bennett v. Tregent*, 25 C. P. 443; *Runnacles v. Mesquita*, 24 W. R. 553; *Lascelles v. Butt*, 24 W. R. 659; *Golding v. The Wharton R. W. Co.*, 20 Sol. J. 391; unless it be made clearly to appear that in the particular matter the subject of appeal there has been some real abuse of the process or procedure of the Court: See *Pike v. Davis*, 6 M. & W. 546; *Gibbons v. Spalding*, 11 M. & W. 173; *Stammers v. Hughes*, 18 C. B. 527; *Burns v. Chapman*, 5 C. B. N. S.

481; *Gadsden v. McLean*, 9 C. B. 283; *Barker et al. v. Lindholt*, 11 W. R. 68; *Stein v. Valkenhuyzen*, 1 E. B. & E. 65; *Cesarini v. Ronzani*, 4 Jur. N. S. 813; *In re Allen*, 31 U. C. R. 458; *Watson v. Charlton*, 40 U. C. R. 142; *Damer et al. v. Busby*, 5 P. R. 386, 387.

The authorities are not consistent as to what is an appeal or only a substantive motion to the original jurisdiction of the Court. If a Judge *refuse* to make an order a motion to the Court for a similar purpose in some cases is held not to be an appeal: *Pike v. Davis*, 6 M. & W. 546; *Hallett v. Cresswell*, 10 Jur. 266; *Thomas v. Evans*, 9 M. & W. 829; *Cesarini v. Ronzani*, 4 Jur. N. S. 813; but the contrary is held in other and more recent cases: *Warman v. Hala-han*, 6 Jur. N. S. 1301; *Bennett v. Benham*, 15 C. B. N. S. 616; *Mitchell v. Harding*, 5 L. T. N. S. 348; *Waddell v. Corbett*, 26 U. C. R. 243.

Where the Judge has made an order for the issue of process, which it is submitted he ought not to have issued, there can be no room to doubt that the application afterwards to the Court against his decision is an appeal, and in such a case the affidavit or affidavits on which the order was made must be before the Court: *Needham v. Bristow*, 1 Dowl. N. S. 700; *Pocock v. Pickering*, 21 L. J. Q. B. 365; *Waddell v. Corbett*, 26 U. C. R. 243—And in such case the rule should be drawn up on reading the affidavit or affidavits used in Chambers: *Edwards et ux. v. Martyn*, 21 L. J. N. S. Q. B. 86; *Stokes v. Grissell*, 14 C. B. 678; *Holmes v. Mount Stephen*, L. R. 10 C. P. 474.

Where the application of the Court is one strictly of appeal, the general rule is, that none but the affidavits which were before the Judge whose decision is appealed from will be looked at or considered by the Court: See *Bullock v. Jenkins*, 1 L. M. & P. 645; *Pegler et al. v. Hislop*, 1 Ex. 437; *Pontifex et al. v. DeMaltzoff*, *Ib.* 436; *Waddell v. Corbett*, 26 U. C. R. 243.

The rule is different where the application is not so much in the nature of an appeal from the Judge's order as a substantive application for relief to the Court: *Gibbons v.*

Spalding, 11 M. & W. 173 ; *Graham et al. v. Sandrinelli*, 16 M. & W. 191 ; *Pegler et al. v. Hislop*, 1 Ex. 437 ; *Bullock v. Jenkins*, 1 L. M. & P. 653 ; *Cesarini v. Ronzani*, 4 Jur. N. S. 813 ; *Waddell v. Corbett*, 26 U. C. R. 243.

The party appealing from a Judge's order must apply to the Court within a reasonable time after the making of the order: *Re Glass and Springer*, 13 C. P. 419. Two years is an unreasonable time: *Griffin et al. v. Bradley*, 6 C. B. 722. So the lapse of four terms: *Buffalo and Lake Huron R. W. Co. v. Hemmingway*, 22 U. C. R. 562. The application should, if possible, be made in the term next after the decision appealed against: *Orchard v. Moxsey*, 2 E. & B. 206 ; *Collins v. Johnson*, 16 C. B. 588 ; *Crashe v. Smith*, 4 C. B. N. S. 426 ; *Oldham Building and Manufacturing Co. v. Heald*, 3 H. & C. 132. An application made on the last day of the succeeding term, returnable on the first day of the term next thereafter, has been held too late: *Bank of Montreal v. Harrison*, 19 C. P. 276. But this rule may be relaxed under special circumstances: *Baker v. Sayers*, 17 L. T. N. S. 579.

There is nothing to prevent an application being made to a Judge to rescind his own order when made *ex parte*: *Shaw et al. v. Nickerson*, 7 U. C. R. 541 ; and in such a case it is not improper to make application to the Judge before applying to the Court by way of appeal: *Day v. Vinson*, 9 L. T. N. S. 654. See further, *Rennie v. Beresford*, 3 D. & L. 467 ; *Ross et al. v. Grange*, 4 P. R. 180 ; but in one case it was held that such an application to the Judge prevents an appeal afterwards to the Court: *Thompson et al. v. Becke et al.*, 4 Q. B. 759. The contrary is held, and we think properly held, to be the rule in this Court: *In re Allen*, 31 U. C. R. 458.

We are of opinion that we have power to review the decision of the learned Judge who made the order for the issue of the writ of *capias ad satisfaciendum*, but we are equally of opinion that his decision ought not to be reversed.

The affidavit on which he made the order discloses a

number of facts and circumstances which may have well satisfied him, and do satisfy us, that the defendant had parted with his property, or made some secret or fraudulent conveyance thereof in order to prevent its being taken in execution.

We do not read the word "property" as used in this section as meaning real estate exclusively. A man may own personal estate and part with the same, or make a secret or fraudulent conveyance thereof, in order to prevent its being taken in execution. The enactment is for the suppression of fraud by judgment debtors, and should receive such a liberal interpretation as will best ensure the fulfilment of its purpose. Whether the property be money or chattels, a debtor may part with the same, or make a secret or fraudulent conveyance thereof, so as to prevent its being taken in execution. The affidavit shews that before June, 1877, the defendant had collected large sums of money for the plaintiff, for which he has given no account. It also shews that in June, 1877, the defendant became possessed of a stock in trade worth about \$2,000. It shews that of this he, before judgment, disposed of about \$1,700 worth, and received about \$1,400. Judgment is obtained against him in October following, and all that the sheriff can realize on execution against his goods and chattels is \$826.20. It is sworn that he has no other property, real or personal, subject to execution. What has become of the difference between the amount realized and the amount which, under ordinary circumstances, ought to have been realized? Looking at his conduct, after being notified not to collect any moneys coming to the plaintiff, his conduct in refusing to pay for the stock which he purchased from the plaintiff, and his determination, if possible, by litigation to defeat the plaintiff's demand, it is not too much to infer that before the making of the order for the issue of a writ of *ca. sa.* he had parted with or made some secret or fraudulent conveyance or disposal of his property to prevent it being taken in execution.

The facts do not so strongly point to the other alterna-

tive, that, unless apprehended, he was immediately about to quit Canada with intent to defraud his creditors; but if the learned Judge who made the order drew even that conclusion from the affidavit we should not feel inclined to quarrel with it.

This disposes of the first alternative in the rule *nisi*, and without reference to the question whether it was made in time or not; but we may add that according to the authority of *Bank of Montreal v. Harrison*, 19 C. P. 276, it was not made in sufficient time.

The application as first made was in sufficient time, but that was only for the discharge of the defendant from custody on affidavits. Such an application is inappropriate when the person applying is in custody under final process. The clause of the Consol. Stat. U. C. ch. 22, which authorizes such an application, only applies when the arrest is under a writ of *capias* or *mesne process*: *Bank of Montreal v. Campbell*, 2 U. C. L. J. N. S. 18.

This being the application which was made to the Court in the first instance, and not, before amendment, being in the nature of an appeal, but of an original application, the Court refused to entertain it, sending the applicant, if he thought himself entitled to relief, to a single Judge sitting for the Court, or a Judge in Chambers. When he got before the single Judge he discovered that his proper application was an appeal, and obtained leave without prejudice to amend his rule *nisi* accordingly. This amendment was not made till long after the expiration of Michaelmas term. He was then in the same position as if in the first instance applying for the rescission of the Judge's order by way of appeal, and according to *Bank of Montreal v. Harrison*, 19 C. P. 276, was too late; but as there is some room for the argument that there are "special circumstances" in this case within the meaning of *Baker v. Sayers*, 17 L. T. N. S. 579; we thought it better, although at increased trouble to ourselves, to give the defendant the benefit of the doubt, and dispose of the application on the merits.

The rule must be discharged, and as the general and

almost universal rule is, that when an application against a Judge's order is discharged it is discharged with costs, and as we see no ground for making an exception in this case, we, following the general rule, discharge the rule *nisi* with costs : See *Hawkins v. Carr*, 6 B. & S. 995.

Rule discharged.

GORDON V. ADAMS.

Counsel fees—Right of action for—Agreement.

H., a barrister and attorney, agreed with D. an attorney, to render D. his services at D.'s office, without confining himself to any particular branch of the business, at a weekly salary. During such employment he acted as counsel at the hearing of two Chancery suits, and in a common law suit, and some arbitrations; and after his employment had been terminated by D. he sued him for the counsel fees in these matters.

Held, that D. was not liable, the presumption being that the services sued for were performed under H.'s employment.

THIS was an action by the plaintiff, as assignee, under 35 Vic. ch. 12, of one J. H., against the defendant for the following claim :—

Balance of counsel fee, <i>Robinson v. Thomas</i>	\$15 00
Counsel fee at hearing, 9 hours, <i>Boyd v. Vivian</i> ..	50 00
“ “ <i>re</i> arbitration, <i>Brown v. Craig</i>	55 00
“ “ “ <i>Clark v. Sarnia Ry.</i> ..	89 00
“ “ <i>Reynolds v. Corner</i>	10 00
Balance counsel fee, <i>re</i> arbitration, <i>Stephenson v.</i> <i>Alimon</i>	10 00
Counsel fee, <i>Palmer v. Keays</i>	26 00
	<hr/>
	\$255 00

The cause was tried before Galt, J., without a jury, at Toronto, at the Winter Assizes of 1878.

It appeared that J. H. was a barrister-at-law, and the defendant was an attorney-at-law and solicitor-in-chancery, but not a barrister.

In May, 1874, J. H. proposed to go into the employment of the defendant, and the following letter shews the terms of that employment:—

SARNIA, May 21, 1874.

MY DEAR MR. ADAMS.

The nature of my proposal was as follows: That I should render you my services at the office without confining myself to any particular branch of the business, until such time as you could secure a suitable student: that I should receive for such services a weekly salary of say eight dollars: that either party might put an end to the arrangement upon giving two weeks' notice.

I think this introduces all that would be requisite between us. Subject to your approval.

Yours truly,

J. H.

J. Adams, Esq.

The stipulated salary was afterwards, on the 4th of September, 1874, increased at the request of J. H. to \$10 a week, the following letter being the request:

SARNIA, August 27, 1874.

MY DEAR MR. ADAMS.

I am desirous of making some more permanent arrangement than the present one, which, as you are aware, may be terminated by either of us in a week or a fortnight. Have you any objection to engaging my services for say six months, at a salary of ten dollars a week instead of eight? If I remain here I shall be moving into the town about the end of next month, and I should have to pay an increased rent, which is one reason for my asking for an increase; and another is that when in town I should be able to give more of my time at the office.

Will you think over this proposal? I do not require an immediate answer.

Yours truly,

J. H.

Joshua Adams, Esq.

The employment continued at the increased salary, which was paid every week, until May, 1877, when the defendant dispensed with J. H.'s services by the following letter:—

SARNIA, May 11, 1877.

J. H., Esq.

Dear Sir,—I regret to say that the practice of my office has so fallen off that it is absolutely necessary for me to reduce my office expenses to the lowest point possible, and I must therefore dispense with your services from and after the 25th instant. Please accept this as notice to that effect, and to terminate the existing arrangement between us as to your services and salary.

I am very sorry indeed to be obliged to take this step, but I cannot avoid it, and very much regret the necessity for the step.

Yours very truly,

JOSHUA ADAMS.

It appeared that *Robinson v. Thomas* was a Chancery suit, tried at the Autumn Chancery sittings of 1876. The \$15 charged was the balance of H.'s counsel fee at the hearing, having been paid \$15 after the hearing. *Boyd v. Vivian* was also a Chancery suit tried at the same sittings. The amount charged was for H.'s counsel fee at the hearing. *Clark and Sarnia R. W. Co.* was an arbitration, and the amount charged was for attendance as counsel at the arbitration. *Reynolds v. Corner* was a Superior Court suit, and the amount charged was for the counsel fee at the trial. *Brown v. Craig* was an arbitration in December, 1876, and the amount charged was for counsel fee at the arbitration. *Stephenson v. Alimon* was also an arbitration at Petrolia, and the fee charged was the balance of his counsel fee for attendance at the arbitration. *Palmer v. Keays* was also an arbitration, and the amount charged was for attendance at the arbitration.

There was no evidence of any express retainer of J. H. as counsel in any of the cases, and there was no other agreement than that contained in the letters: that although the services were all performed during the time that J. H. was in the defendant's office, no charge was made until a few days after his services were dispensed with. It also appeared that defendant had paid J. H. his weekly salary as it was payable, and had over paid him on this account \$40.

The assignment by J. H. to the plaintiff was under

seal, and dated 30th of September, 1878, and stated that "I" J. H., "in consideration of my indebtedness to Leslie Gordon, of the village of Cooksville, Esquire, do hereby assign and transfer to him and his assigns all my claim and interest in and to the sum of two hundred and fifty dollars due to me by Mr. Joshua Adams, of the town of Sarnia, attorney-at-law."

It appeared that the amount for which J. H. was indebted to the plaintiff was \$150, and he directed the plaintiff to pay the balance to one Flintoft for rent due to him by J. H., which the plaintiff agreed to do.

For the defendant it was objected that no action could be maintained for counsel fees: that a cause of action for counsel fees did not arise out of contract, and was therefore not assignable at law: that the plaintiff did not represent the beneficial interest in the chose in action, and could not therefore recover, at all events as to the part which was payable to Flintoft: that all the items which were set out were not included in the assignment; and that under the agreement which had been proved the plaintiff was not entitled to recover.

The learned Judge found as follows:—

"Subject to the defendant's objection with reference to an action for counsel fees not being maintainable, and which for the present I overrule, I find a verdict for the plaintiff for the first item of \$15 for counsel fee in *Robinson v. Thomas*; for \$50 in the case of *Boyd v. Vivian*; for \$55 in the matter of the arbitration of *Brown v. Craig*; for \$10 for counsel fee in *Reynolds v. Corner*. I disallow the \$10 for attendance at Petrolia, because Mr. Adams paid the expenses there. I allow the counsel fee in *Palmer v. Keays*, \$26. I deduct \$40, the balance of Mr. Adams's account. I enter a verdict for the plaintiff for \$116, and reserve leave to the plaintiff to move to increase the verdict by \$99, if the Court think the attendance before the arbitrators can fairly be construed as outside the agreement between the parties. I reserve the question of costs."

In this term, February 7, 1878, cross rules were obtained.

J. K. Kerr, Q.C., obtained a rule *nisi*, under the Law Reform Act, to set aside the verdict for the plaintiff, and to enter a verdict for the defendant.

Beaty, Q.C., obtained a rule *nisi* to increase the verdict for the plaintiff by \$99.

During the same term, February 20, 1878, *Beaty*, Q.C., shewed cause to the defendant's rule and supported the plaintiff's. He referred to *McDougall v. Campbell*, 41 U. C. R. 332; *Potter v. Rankin*, L. R. 5 C. P. 135; *Hawkins v. Rigby*, 8 C. B. N. S. 271; *Russell on Awards*, 5th ed., 635; *Wood v. McAlpine*, 1 App. 234; *Postmaster-General v. Robertson*, 41 U. C. R. 374; *Re Hall*, 2 Jur. N. S. 1076; *Miller v. McCarthy*, 27 C. P. 147; *Dawson v. Graham*, 41 U. C. R. 53; *Howell v. McFarland*, 2 App. 31.

J. K. Kerr, Q.C., contra, referred to *Miller v. McCarthy*, 27 C. P. 147; *Hostrawser v. Robinson*, 23 C. P. 360; *Wood v. McAlpine*, 1 App. 234.

March 15, 1878. ARMOUR, J.—It is not shewn that there ever was any express contract by the defendant to pay J. H. the counsel fees claimed, and the contract to pay them, if any exist, is by implication only.

I do not think that any such implication arises. The services sued for were all performed during the contract of employment, and while J. H. was receiving a weekly salary covering and including the very time during which he performed them. The presumption therefore is, that they were performed under the express contract of employment, and not outside of it.

The fact that, although J. H. was receiving his salary weekly, and the fees for these services, if payable to him, must have been an object to him, he never made any claim for them till after his services were dispensed with, is to me cogent evidence that at the time he performed the services he understood, as the defendant did, that he was performing them under his contract of employment.

If any implication did arise that J. H. was to be paid for these services, I should have great difficulty in holding

that such implication was that he should be paid by the attorney, and not by the client: *Miller v. McCarthy*, 27 C. P. 147; *Mostyn v. Mostyn*, L. R. 5. Ch. 457.

A serious objection was also raised to the plaintiff's recovery on the ground that, although possessing a beneficial interest in the claim sued for at the time of action brought, he did not possess the whole beneficial interest; but in the view I have taken on the evidence it is unnecessary to decide this: *Hostrawser v. Robinson*, 23 C. P. 350.

The question as to the right to sue for counsel fees being before the Court of Appeal for decision, I say nothing about it, but my silence is not to be construed as an assent to the proposition that they can be sued for.

The defendant's rule to enter a verdict for him should be made absolute, and the plaintiff's rule discharged.

HARRISON, C. J., and WILSON, J., concurred.

Rules accordingly.

GRAY ET AL. V. SCHOOLEY.

Contract—Conditions precedent—Vessel—Depth of water.

Where it was agreed that defendant was to send his vessel to Kincardine to load a cargo of salt for the plaintiffs, provided they would furnish a full cargo, at a stated price, or would guarantee $11\frac{1}{2}$ feet of water in the harbour. *Held*, that the stipulations as to a full cargo, and as to the depth of water were conditions precedent to the performance of the contract, and not merely collateral or independent stipulations; and that, as there was not the depth of water guaranteed, nor such depth of water as would permit the defendant to load a full cargo, the defendant was not liable for not taking the plaintiffs' salt.

THIS was an action for breach of contract in not carrying a cargo of salt for the plaintiffs from Kincardine to Chicago.

The cause was tried before Galt, J., without a jury, at Walkerton, at the Spring Assizes of 1877.

It appeared that on the 18th of November, 1875, one H. T. Hurdon, on behalf of the plaintiffs, telegraphed to the defendant at Welland: "Quote lowest price for cargo bulk salt Chicago, *Lady Dufferin*." To which defendant on the same day replied: "If you can give full cargo, eighty cents, free of handling." On the same day Hurdon again telegraphed the defendant: "I accept your offer, *Lady Dufferin*, (80) eighty cents American currency, free of handling. Answer."

The defendant on the same day replied: "All right; may expect her next week, perhaps fore part. Have you another load?"

On the 11th of November, Hurdon telegraphed: "I can get you another cargo salt Chicago."

On November 16th, the defendant telegraphed Hurdon: "Captain of *Dufferin* says could not get out of Kincardine with only five twenty-five (525) tons last trip up. Not water enough for full cargo. Can't send *Dufferin* unless you guarantee eleven and one-half ($11\frac{1}{2}$) feet water."

On November 17th, Hurdon replied: "Send *Dufferin*. Vessels do load here to eleven six. Tell when she leaves." The defendant on the same day replied: "You don't guarantee water enough in channel for full cargo for *Dufferin*, therefore can't send her." To this Hurdon replied: "I did

guarantee eleven and half ($11\frac{1}{2}$) feet water. Last cargo salt left here drawing twelve. Send *Dufferin* at once."

On November 19th, Hurdon again telegraphed: "Has *Dufferin* left," &c., to which the defendant on the same day replied: "Wind hard down the lake. Will strip *Dufferin*."

On November 20th, Hurdon telegraphed: "We hold you to your charter November 10th, and look to you for damages in case of default."

On the same day defendant answered: "As you would not guarantee eleven and half ($11\frac{1}{2}$) feet water, I have closed charter with Rightmeyer."

On the 23rd November, Hurdon then telegraphed: "We are bound to deliver under contract. Have relied on your charter of November tenth (10th), which we will hold you to. If you had asked more, would have given it. Must have *Dufferin*, even if obliged to pay more than our charter."

The defendant then telegraphed: "I chartered on condition of full cargo. You refused to guarantee water enough, and Captain Miner says positive could not get out with full cargo, and I told him to strip, and notified you to that effect. Rightmeyer afterwards made proposition, which I finally accepted."

On November 24th the *Dufferin* arrived at Kincardine, when Hurdon, by his attorney, served the captain with a written notice requiring him to take a cargo under the contract of the 10th of November, and in accordance with the subsequent telegrams; and in default, he would hold him and the defendant responsible for any loss or damage.

The captain, notwithstanding this notice, took a cargo for Rightmeyer, consisting of 482 tons.

The defendant contended that there was not sufficient water to enable the vessel to take a full cargo, and therefore he was not bound to carry out the contract.

The additional facts, so far as material, appear in the finding of the learned Judge at the trial.

The finding of the learned Judge was as follows:—

1. That there was a concluded agreement between the parties, as shewn by the telegrams of the 10th of November, 1875, that the defendant would send his vessel to Kincardine to load a cargo of salt for the plaintiff, provided they could furnish a full cargo at the price of eighty cents, free of handling. 2. I find that this agreement was subsequently modified by both parties, as shewn by the telegrams of the 16th of November and 17th of November, and the plaintiffs guaranteed that there was $11\frac{1}{2}$ feet of water in Kincardine harbour. 3. I find that after the correspondence of the 17th of November the defendant did, without communication to the plaintiffs, direct his captain to lay up the vessel. 4. I find that subsequently to this direction the defendant sent his vessel to Kincardine and took a cargo of salt for another party than the plaintiffs, which cargo consisted of only 482 tons. 5. I find that the carrying capacity of the *Dufferin* was 700 tons. 6. I find that there was not a depth of water to the extent of $11\frac{1}{2}$ feet. 7. I find that the defendant or his captain refused to carry any of the salt for the plaintiffs. 8. I find that the quantity of salt belonging to the plaintiffs was 600 tons.

“Upon the above findings, I am of opinion that the defendant was guilty of a breach of contract in not sending his vessel: that it was his duty to have sent her, and if on her arrival it was found that owing to any cause for which the plaintiffs were responsible a full cargo could not have been taken on board, he might have claimed against them the price of carrying a full cargo.

“I therefore find a verdict for the plaintiffs for \$350. I reserve leave to the defendant to move to enter a verdict for him, if the Court shall be of opinion that, owing to there not being eleven and a half feet of water in the harbour, the defendant was justified in refusing to send his vessel to carry the salt of the plaintiffs. The evidence satisfies me that there was not that depth of water.

“The verdict will therefore be for the plaintiffs, with \$350 damages.”

In Michaelmas term, November 20, 1877, *Robinson*, Q.C., obtained a rule *nisi* to set aside the verdict for the plaintiffs, and to enter a verdict for the defendant.

In this term, February 18, 1878, *Bethune*, Q.C., shewed cause.

Robinson, Q.C., contra.

March 15, 1878. ARMOUR, J.—The findings of the learned Judge on the questions of fact in this case are not found fault with by either party, and upon these findings the defendant is, in my opinion, entitled to a verdict.

In *Callonel v. Briggs*, 1 Salk. 113, Holt, C. J., says: "Though there be mutual promises, yet if one thing be the consideration of the other, there a performance is necessary to be averred."

In *Boone v. Eyre*, 1 H. Bl. 273 note, Lord Mansfield says: "Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other."

In *Campbell v. Jones*, 6 T. R. 570, Lord Kenyon says, at p. 571: "Whether these kinds of covenants be or be not independent of each other must certainly depend on the good sense of the case. If one thing is to be done by a plaintiff before his right of action accrues on the defendant's covenant, it should be averred in the declaration that *that* thing was done."

In *Ritchie v. Atkinson*, 10 East 295, Lord Ellenborough says, at p. 307: It "depends not on any formal arrangement of the words, but on the reason and sense of the thing * * whether of two things reciprocally stipulated to be done, the performance of the one does in sense and reason depend upon the performance of the other."

In *Stavers v. Curling*, 3 Bing. N. C. 355, Tindal, C. J., says, at p. 368: "The rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent on or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument,

and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way."

See also *Abbott* on Shipping, 11th ed., 221; *Hoare v. Rennie*, 5 H. & N. 19; *Bradford v. Williams*, L. R. 7 Ex. 259.

The stipulation by the plaintiffs in the contract, evidenced by the telegrams of the 10th of November, for a full cargo, and the stipulation in that contract as subsequently modified for eleven feet and six inches of water in the harbour, were not merely collateral or independent stipulations, but were stipulations which formed part, and an essential part, of the consideration for the defendant's promise, and went to the very root of the contract, and were conditions precedent.

If a man contracts to do an act in consideration that another has contracted to do certain things on his part, and it should turn out before anything is done under the contract that the latter is unable to do what he has engaged to do, the contract is at an end: *Chanter v. Leese*, 4 M. & W. 295.

In my opinion the rule should to be absolute to enter a verdict for the defendant.

I refer also to *Ollive v. Booker*, 1 Ex. 416; *Oliver v. Fielden*, 4 Ex. 135; *Tully v. Howling*, L. R. 2 Q. B. D. 182; *Morris v. Levison*, L. R. 1 C. P. D. 155; *Jones v. Holm*, L. R. 2 Ex. 335.

HARRISON, C. J., and WILSON, J., concurred.

Rule absolute.

McCracken ET AL. V. WARNOCK.

Ejectment—Description of land—Possession—Statute of Limitations.

In a deed under which defendant claimed in ejectment the description was "The east side of the southerly part of lot 24, containing ninety acres."

Held, that this was a good description of the east ninety acres of the southerly part of the lot, and that it sufficiently appeared what the southerly part was, for the patent from the Crown was for the rear or southerly parts of lots 23 and 24 described by metes and bounds, and the deed to the defendant's grantor referred to the patent.

Held also, that there was sufficient evidence of possession of the land by the defendant and those through whom he claimed to give a good title under the statute, and this although the possession of a portion thereof had been that of the owner of the adjoining lot 25 under the mistake that it was part of his lot, for on its being ascertained by a survey to be part of lot 24, it was immediately given up to the owner thereof, to whom the owner of lot 25 also subsequently conveyed it.

EJECTMENT for 115 acres, composed of part of the rear or southerly part of lot No. 24 in the 1st concession (Ottawa front) of the township of Gloucester, describing the limits particularly.

The defendant appeared and defended for the whole.

The plaintiffs claimed title as heirs-at-law of James McCracken, who claimed title under and by virtue of a deed from one Paul Glassford, dated the 31st of August, 1844.

The defendant William Warnock, besides denying the plaintiffs' title, claimed title in himself by deed from Donald McLaughlin, of that part of the lands at the west limit of the lot, two chains and one-half a link in width, and extending along the whole of the west side of the lot, and containing about fifteen acres of land. And all the residue of the land sued for, he claimed by deed from James Warnock.

He also claimed title to the whole land by possession in himself, and of those from whom he claimed.

The cause was tried at Ottawa, at the last Fall Assizes, before Burton, J. A., without a jury.

The question was one of survey and boundary chiefly.

The parcel of land comprising the rear part of the lot

was a parallelogram of 20 chains 82 links by 70 chains 39 links.

At the north-east corner of it, a parcel of 10 chains by 30 chains, containing 30 acres, was not in question.

The lots when settled upon were occupied not according to their true lines. In 1860 a correct survey was made and it was found that the westerly lots had encroached easterly, that is, 25 upon 24, and 24 upon 23, about as much as eight chains, making a difference in quantity of about 50 acres, and the lines were shifted accordingly.

The plaintiffs proved their paper title, and the learned Judge held there had been no title acquired against the plaintiffs by length of possession, and he gave a verdict for the plaintiffs for the whole of the land.

The plaintiffs' paper title was the grant from the Crown to Eleanor, the wife of William Abrams, of the rear or southerly parts of lots 23 and 24, in the 1st concession of the said township, containing 200 acres, more or less, dated the 13th of March, 1828.

A deed proved by sworn copy, and by certified copy of memorial, and by the evidence of William Abrams, dated the 20th of October, 1840, from William Abrams and Eleanor, his wife, to Paul Glassford, of the said land so granted by the Crown.

Deed, dated 31st of August, 1844, from Paul Glassford to James McCracken, of the rear or south half of lot 24 in the 1st concession of Gloucester, containing 200 acres, more or less.

The plaintiffs' heirship to their father, who died intestate about sixteen years ago, was then proved.

The defendant's paper title was as follows:

Deed, dated 27th of April, 1843, from Paul Glassford to Robert Mosgrove, "of the east side of the southerly part of lot No. 24 in the first concession Ottawa front, containing by admeasurement ninety acres."

Deed, dated 30th of April, 1859, from Robert Mosgrove, and his wife for dower, to James Warnock, "that part of land containing 90 acres, being composed of the east side of the southerly part of," &c., as in the previous deed.

Deed, dated 29th of January, 1873, from James Warnock, and wife as to dower, to W. Warnock, of a strip along the west side of the 15 acres of 1 chain 55 links in width ; and also of the 90 acres, described exactly as in the two previous deeds.

Deed, dated the 1st of April, 1872, from James Warnock, and wife as to dower, to William Warnock, of the before mentioned fifteen acres.

Deed, dated the 1st of April, 1872, from Donald McLaughlin, and wife as to dower, to William Warnock, the said fifteen acres.

William Mosgrove said : Donald McLaughlin owned the east half of the rear part of lot 25, and his (witness's) father, Robert Mosgrove, owned the 90 acres of the rear part of lot 24 up to McLaughlin's line, and was in possession of the same, and he thought it went up to Egleson's at the north : that would be to the north limit of the rear part of lot 24. The thirty acres at the northeast corner of the lot were then in possession of one Carson. The witness's father got his deed from a man of the name of Douglas. He was then in possession on behalf of the witness's father. That was in 1843. His father held the property up to 1856. He also said, McCracken conveyed in 1853 to my father, and immediately after that Douglas went into possession. At that time Paul Glassford was residing on a part of lot 24 further north. * * There is a blank in my memory as regards that property from 1843 down to 1852 * * My father lived between those years, not on the property but in Ottawa, then Bytown * * My father bought the land from Glassford, not from Douglas. Douglas was the man that went there for my father as a tenant. * * We lived a short time on lot 26, the other lot my father bought ; we lived in the city prior to 1856. I believe that prior to that it was vacant. * * I think Douglas had cleared two acres in 1843. I know of no other clearing. I believe Douglas built a house on the property, and that he went in as tenant immediately after the purchase of the property. I am not aware

of anybody living on the property after Douglas left it. It was vacant, except that my father was in the habit of taking wood off it for the house. There was no fence in 1843. So far as I know the clearance made by Douglas may have been on lot 25 and not on lot 24 at all. In 1853 my father bought lot 26, which brought us out to live there.

Donald McLaughlin said: I lived in that neighbourhood eighteen years. Went on to lot 25 in 1855, on the west of the land in dispute. My land was alongside of Mosgrove's land, from the concession line up higher than Warnock's land. Mosgrove was in possession of what is now called the Warnock land at that time. Our holdings met. There was a fence between us the whole way. Mosgrove went up as far as Egleson's on the west side of lot 24. There was a fence between him and Egleson at that time on the north side. There was a log fence on the south when I went there, half way east. The east side of the lot was marked, but not fenced. There was a large clearing on it in 1855. There was a strip about eight chains of a clearing on the concession on the west side, extending as far back as Egleson's. There would be between fifty and sixty acres in that clearing. In the other clearing there would be about thirty acres more. The latter clearance was south of Carson's land. What we occupied of lot 25 we occupied up to the time the meridian line was run in 1859 or 1860 by Cromwell. At that time James Warnock claimed the land that Mosgrove owned, and I rented from Warnock. He got possession of the land from Mosgrove. When the line was run they moved me over eight chains. It was lot 24 I had cultivated and worked on more than on lot 25. Warnock owned only the east half of lot 25. Lot 24 then took between 50 and 60 acres of what had been supposed to be lot 25. After Mosgrove got possession I did not have anything to do with what was considered then his land. James Warnock occupied it after Mosgrove. I was tenant of the whole of the land after that. I paid the taxes. I held over as far as 23, and as far up as Egleson's. * *

I held all the land under James Warnock up to five years ago, in April, 1872, when I sold to William Warnock. James sold to William Warnock at the same time, and he has been in possession ever since. I leased the land from James Warnock when the meridian line was run. I occupied a good part of it before, and then I occupied the rest of it. According to that survey the surveyor made out it was lot 25 (*qu.* 24) I occupied, thinking a part of it was my own land. I did not occupy it for James Warnock. I supposed it was my own. Warnock had the best part of lot 24 in 1861. * * I had nothing to do with lot 24, excepting as to the fifteen acres. Previous to the survey I occupied the twenty-five acres at the west of lot 24 for myself, claiming it for myself. * * The only clearance there was on lot 24, was the land which I occupied as my own, claiming it as a part of lot 25 until the survey of 1860. That is part of what I supposed I purchased when I purchased lot 25. It had been occupied by the party who had the land before me. I got it from him, and I claimed it as part of lot 25 until the survey. Mosgrove had no clearance on lot 24 on the concession road. There were between forty and fifty acres cleared on lot 24 before Warnock or I had anything to do with it. * * Carson on the east of Mosgrove came in upon him, that is on lot 24, eight chains. * * I sold to William Warnock 100 acres, more or less, of lot 25.

John W. McGuire said: he had lived on the second concession, to the south of this lot, since 1846; has known this property since 1839. "I lived on the east side of lot 25. I understood Mr. Yielding succeeded Mr. Waddell, and Mr. McLaughlin succeeded him. Waddell was in possession of part of lot 25 in 1839, there was a fence between lots 25 and 24. The part of lot 24 in question was formerly held by Mosgrove. Glassford had it before him, and Douglas had a portion of it. * * * Mosgrove made a clearing up along the old line, between lots 23 and 24, about 1859. There was forty-five acres cleared by Mosgrove, Douglas, and others. I call Douglas the man."

James Britton said: he had been about there since 1857. Glassford occupied a part of lot 24. He left it twenty years ago. "No person that I know of has been occupying the rear of lot 24. I heard Mosgrove occupied it. He did a little on it. He took his firewood off it four or five years after 1857. Except that, I never knew him doing anything with the property. He has not had a tenant on it since 1857. He was understood to claim it."

James Warnock said: "I got a deed from Mosgrove, on the 30th of April, 1859. After I got it I went into possession of the rear part of lot 24. McLaughlin lived on the west side of the lot. There was a fence then between us, part of the way, and running to the concession line. Part of the concession line was not fenced. On the east side there was a fence between me and Carson, which ran a good way to the south of the thirty acres. I rented it to Mr. McLaughlin, and he cropped it the first year. He occupied it under me until I sold it to my brother in 1873 and he has been in possession since then. The parties gave up possession as soon as they found the lines not right. I got about fifty-five acres of cleared land on the west by the new survey. It had been cleared as a part of lot 25."

* *Michael Spiers* said: "In 1844 Glassford had scarcely an acre cleared, and there was then no other clearing on lot 24. There was chopping on it done every year by anybody who wanted timber. When Mosgrove bought he cut some wood on the lot; that is all he ever did. He did not clear much. There was nobody doing anything on lot 24 after 1852 that I know of. I don't know that Mr. Mosgrove exercised acts of ownership over the lot after 1845. The first person who occupied it after Mr. Mosgrove was James Warnock. Lot 24 was called Mosgrove's lot. Mosgrove may have made a clearing on the lot without my knowing anything about it. I was not troubling myself about what Mr. Mosgrove was doing. Glassford sold the thirty acres to Carson, and he continued to live on the other part of the lot. He treated it as his own."

Archibald Carson said: "I heard that old Mr. Mosgrove

owned this property. I know he cut cedars and firewood on it. I saw him cutting it frequently for years. He was cutting on every part of the lot that would suit him, and I have done so myself."

There was a great deal more evidence to the like effect.

The learned Judge noted as follows:—

"Entertaining at present the view that the deed was ineffectual to pass the property, I will so hold. I shall also hold that the acts of possession, assuming that there is no proper conveyance, are quite insufficient as evidence of possession against the real owner; and, in reference to the possession that was held before the new survey, it is impossible for the defendants to rely upon that. That is not a possession that would enure to their benefit, whatever might have been the result if the parties had chosen to resist the action. That being the case, I will enter a verdict for the plaintiffs for the whole 115 acres."

In Michaelmas Term, November 21, 1877, *Bethune*, Q.C., obtained a rule calling on the plaintiffs to shew cause why the verdict entered for the plaintiffs should not be set aside and a verdict entered for the defendant, pursuant to the Law Reform Act; and on the grounds that the plaintiffs did not prove any title in their ancestor or themselves, and that, upon the assumption that the deed from Glassford to Musgrove is void for uncertainty, then the deed from Abrams to Glassford is also void for uncertainty; on the ground that the defendant established title in himself by deed from Paul Glassford to Musgrove, and various mesne conveyances to the defendant; and on the further ground that the defendant established title in himself by length of possession in himself and those under whom he claimed title; and on the further ground that it appeared that, as to all the land not described in the deed from Paul Glassford to Robert Mosgrove, the plaintiffs and their ancestors had been more than twenty years before the commencement of this suit continuously out of actual possession, and other persons during all that time were in actual possession there-

of, and therefore the plaintiffs were not entitled to recover the said land: or why the defendant should not be allowed now to plead an equitable defence, setting forth a contract between Paul Glassford and Mosgrove to sell 90 acres of the said southerly part of lot No. 24, made on the date of the said deed from Paul Glassford to the said Mosgrove, in consideration of £90 15s. then paid by Mosgrove to him: that Mosgrove, with the consent of Glassford, took possession of the said 90 acres, as owner, which said 90 acres would be the most easterly part of the said southerly part of the said lot, including the 30 acres theretofore sold to Carson, and continued in possession until he sold to Warnock, under whom the defendant claims: that when Glassford conveyed to the plaintiff's ancestor he had notice of the contract of Mosgrove with Glassford, and averring subsequent conveyances from Mosgrove to the defendant, and praying that it may be declared that, as against the plaintiffs, the defendant is entitled in equity to the said land, and that the plaintiffs may be ordered to convey the same to the defendant in fee simple; or why, in the event of the Court being of opinion that the plaintiffs are not prevented from recovering by the Statute of Limitations, the verdict should not be confined to that part of the land not embraced in the deed from Glassford to Mosgrove; or why a new trial should not be granted.

In Hilary Term, February 11, 1878, *J. K. Kerr*, Q. C., shewed cause. The description in the deed from Glassford to Mosgrove is void for uncertainty. The grant was "of the east side of the southerly part of lot No. twenty-four in the first concession, Ottawa front, containing ninety acres;" and some others of the conveyances were similarly worded: *Austin v. Armstrong*, 28 C. P. 47; *Knaggs v. Ledyard*, 12 Grant 320, 323; *Booth v. Girdwood*, 32 U. C. R. 23; *McDonell v. McDonald*, 24 U. C. R. 75, 79; *Grant v. Gilmour*, 21 C. P. 18; *Davis v. McPherson*, 33 U. C. R. 376; *White v. Myers*, 10 U. C. R. 574; *Arner v. McKenney*, 8 C. P. 373; *Fraser v. West*, 21 C. P. 161. The defendant claims twenty-five acres by one title, and the

remaining ninety acres by the deed of Paul Glassford. Adverse possession cannot prevail here, because there was no sufficient possession taken of the lot for a period as long as twenty years; and even if there had been a possession for that length of time, it was not a possession which can enure to the defendant's benefit, because, in 1860 or 1861, when those who had before that time held parts of lot 24 by mistake as parts of lots 23 and 25, respectively, gave up possession of such parts as parcels of lot 24, they gave them up to and for the benefit of the true legal owner of the lot, who was then the plaintiff's ancestor, and the time of possession as against the plaintiff can only be computed from that time, which does not constitute a sufficient bar in law: *Young v. Elliott*, 25 U. C. R. 330; *Wishart v. Cook*, 15 Grant 237; *Low v. Morrison*, 14 Grant 192; *Davis v. Henderson*, 29 U. C. R. 344; *Mulholland v. Conklin*, 22 C. P. 372; *McMaster v. Morrison*, 14 Grant 138; *Kipp v. The Incorporated Synod of Toronto*, 33 U. C. R. 220; *Doe dem. Carter v. Barnard*, 13 U. C. R. 945; *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Cooley v. Smith*, 40 U. C. R. 543. The defendant then asks, if he fail in his legal defence, to set up an equitable defence. He did not prove any money paid by him; and there is still the same objection that the contract is so indefinite in the description of the land that it cannot be established.

Bethune, Q. C., supported the rule. Glassford thought he had 120 acres in the south part of lot 24. He had sold thirty acres, and that is the reason he conveyed the ninety acres which was, as he believed, the remainder of his land, to Mosgrove. If the deed to Mosgrove does not contain a sufficient description of the land, neither does the deed from Abrams and wife to Glassford contain a sufficient description, which describes it as follows: "That land, containing two hundred acres, more or less, being the rear or southerly parts of lots number twenty-three and twenty-four in the first concession of the said township, and for further particulars reference to land to original patent from the Crown."

And if that deed be defeated then neither party has a paper title, and the plaintiffs must fail: *Putzel v. VanBrunt*, 40 N. Y. Sup. C. 501. Mosgrove's deed was made and registered before the deed was made to the ancestor of the plaintiff: *Pettit v. Shepard*, 32 N. Y. 97, 103. The defendant claims the whole 115 acres, the residue of the lot, because the sale was intended by Glassford to be of the residue of the lot after deducting the thirty acres. From 1848 to the present time Mosgrove and those claiming under him have had continual possession of all the land now in question, excepting that part of it comprising about the eight westerly chains which James Warnock, his vendee, got by the new survey of 1860, as part of lot 24, which before had been held by the owner of lot 25 as part of lot 25. But Warnock afterwards bought that part of lot 25 from the former owner of it, so that he has acquired the title of such former owner of lot 25 to the part of lot 24 which he had before held in error. His time of possession enured nevertheless to James Warnock, who succeeded to his possession claiming title: *McKinnon v. McDonald*, 13 Grant 152; *Heyland v. Scott*, 19 C. P. 165. The defendant has a perfect title by length of possession to the whole land: *Tyler on Boundaries*, 127-131; *Cummings v. McLachlan*, 16 U. C. R. 626; *Juson v. Reynolds*, 34 U. C. R. 174; *Nolan v. Fox*, 15 C. P. 565. If the defendant cannot succeed on his present defences, he should be allowed to set up the equitable defence set out in the rule which the documents and long undisturbed possession establish. If that defence be added, there may have to be a new trial. If it be not added, he would very much desire a new trial to make a better case before losing the land, which is held upon a just and *bonâ fide* title, and accompanied with so long a period of possession.

March 15, 1878. WILSON, J.—I am of opinion that the conveyance from Glassford to Mosgrove “of the east side of the southerly part of lot 24, containing ninety acres,” is a good description “of the east ninety acres of the southerly part of lot number twenty-four.”

If it had been the east side of the southerly *half*, in place of *part*, there could be no doubt of the sufficiency of the description. But the word *part* has in this case a sufficiently precise meaning and identity, because the grant from the Crown describes the land as follows: "All that parcel or tract of land situate in the township of Gloucester, containing by admeasurement 200 acres, be the same more or less, being the rear or southerly parts of lots numbers twenty-three and twenty-four in the first concession of the said township, which said 200 acres are butted and bounded, or may be otherwise known as follows, that is to say: Commencing," &c. Then follows a description by metes and bounds particularly identifying the said "rear or southerly parts of lots."

The deed from Abrams and wife to Paul Glassford describes the lands as the rear or southerly parts of the lots; and then it refers for further particulars to the patent, so that the description in that deed is equivalent by such reference to the giving of the full metes and bounds as they are set out in the patent.

And I am glad to maintain, as far as I can, a deed honestly made, and under which possession has been held by it from the time it was made in 1843 until the present time.

I entertain no doubt that the like description in the patent, which is contained in the deed, is a sufficient description, and that the description in the deed can be supported by a reference to the patent upon which it is founded, which ascertains and defines what the rear or southerly part of lot 24 is.

If the deed had really failed on that ground, I think the title of the grantee, and of those claiming under him, could have been supported under the Statute of Limitations, for there is abundant evidence to sustain the claim of the defendant by mere length of possession of the land.

There could, I think, have been no doubt about this, if the boundaries had not been disturbed in 1860. But what difference that can make I am not able to understand.

Somebody had possession of a part of the land which the plaintiffs claim as theirs. Whether he claimed it as part of lot 24 or part of lot 25, or whether he claimed it by title or without title, he had it at any rate until 1860 in that manner.

In that year the possession, to the extent of about fifty acres of what was before held as part of lot 24, was given up to lot 23, and about the like quantity of what was before held as part of lot 25 was given up to lot 24, and so the like change was made in lot 26, and some of the other lots westward. But the possession then given up by the former holder was taken, and by claim of title, by the person who got it from him, thus continuing the possession of the former holder, if that be of any consequence when possession is set up by a defendant.

How that change of possession can enure to the benefit of the one who has the paper title against an actual adverse holding all the time by others, is hard to comprehend.

The defendant and those from whom he gets title have the earliest deed, and the earliest registered. They alone have occupied the land, and improved it, and occupy it still; and now after possession just and equitable at least, but legal also in my opinion, for thirty-six years before action brought, it would be very hard and unjust if he could be disturbed.

It cannot be regretted that these plaintiffs, the children of one who took a second deed from Paul Glassford, and who never was on the land or at it, according to the evidence, who present themselves after this long and quiet possession as the true proprietors of the land which they claim of right to belong to them, and from which they seek to eject the defendant as a mere trespasser, should fail in their suit, because it is as unreasonable as it seems to be an unjust demand.

If the present defence had failed, the defendant should have been allowed to shape his defence in any form he could to resist the action.

In my opinion the rule must be made absolute to set aside the verdict for the plaintiffs, and to enter it for the defendant.

HARRISON, C. J., and ARMOUR, J., concurred.

Rule absolute.

WHITE V. MCKAY ET AL.

Ejectment—Adding co-plaintiff—New trial for discovery of new evidence.

In ejectment the plaintiff claimed as grantee of one S., but the conveyance was not executed until after the commencement of the suit. A verdict having been entered for the plaintiff, the plaintiff, on shewing cause to a rule for a new trial, filed the consent of S., who at the commencement of the suit was a mere bare trustee for the plaintiff, to be added as a plaintiff, and the Court allowed the amendment.

A new trial was refused on the ground of the discovery of new evidence, when it was not shewn that the evidence could not have been procured before the trial; and when such evidence went to prove, not that defendant had any title, which was in no way shewn, but that a third person, with whom he had no privity, was entitled to a moiety of the land.

THIS was an action of ejectment, commenced on the 5th day of May, 1875, and brought to recover possession of the east half of lot No. 21 in the first concession of the township of Amherst Island.

In his notice of title as originally delivered the plaintiff claimed as grantee of John Macdonald, and as grantee of George Scott, who was heir-at-law of James Scott.

The defendants claimed title by twenty years possession and upwards in themselves and those through whom they claimed.

The cause was tried before Moss, J.A., without a jury, at the last Fall Assizes, at Napanee.

Upon opening the case, the counsel for the plaintiff asked leave to amend the plaintiff's notice of title by adding, "and also as grantee of Martha Scott, who was devisee of George Scott, who was heir-at-law of James Scott," which leave was granted, the counsel for the defendants saying that such amendment was intended to cover a deed given since the commencement of the action; and that, subject to the right to make this objection, he did not object to the notice being so amended.

On the part of the plaintiff it was proved that one John Macdonald being the owner in fee conveyed the land in question to one James Scott, who went into possession of it and continued in possession of it until his death, some time in 1862: that James Scott died intestate and without issue, and his brother George Scott was his only heir-at-law. The heirship of George Scott was established by the evidence of Joseph Gould, who deposed to knowing the Scott family in Somersetshire: that he knew James Scott there before the latter came to this country: that he knew George Scott: that the latter was married to his mother's sister: that George Scott was the only brother of James Scott: that they had one sister, who died childless long ago; and that their parents were long since dead.

The heirship was also proved by the evidence of the plaintiff, who deposed that he was the grandson of George Scott: that he never heard of any other brother of James Scott but George Scott: that James Scott had had one sister who had died in England long before he recollected, and he heard she had no descendants.

The plaintiff put in and proved a deed from John Macdonald to him, which he explained that he obtained because the deed from Macdonald to James Scott could not be found.

He also proved an agreement under seal, dated the 19th of November, 1869, between George Scott and himself, whereby George Scott agreed, in consideration of an annuity of five pounds a year, to convey to him all his estate, right, title, and interest in the lands of James Scott where-soever situate; and that George Scott died in 1873.

The will of George Scott was also proved by the probate thereof to Martha Scott, the sole executrix thereof, by which will the said Martha Scott was the sole devisee of all the real estate, whatsoever and wheresoever, of the said George Scott.

The plaintiff also put in and proved a conveyance from Martha Scott to him, executed after the commencement of this suit.

The defendants offered no evidence, and it was agreed that a verdict should be entered for the plaintiff, and that the defendants' counsel, who had not had an opportunity of examining the documents, should be at liberty to move *in banc* upon any ground that might be open to him upon the evidence, either oral or documentary.

No motion was made in last Michaelmas Term, owing to some negotiations for a settlement, which proved abortive.

During this Term, February 7, 1878, *Osler*, by consent of the plaintiff, obtained a rule *nisi* to set aside the verdict for the plaintiff, and to enter a verdict for the defendants, on the ground that the plaintiff proved no title to the land in question at the commencement of this action; and for a new trial on the ground of the discovery of new evidence, namely, the evidence of one Alfred Dunn, to shew that the plaintiff had no title to more than one undivided one-half interest in the land in question.

During the same Term, February 22, 1878, *Nicol Kingsmill*, shewed cause.

Osler, contra.

March 15, 1878. ARMOUR, J. On shewing cause to this rule the plaintiff filed the consent of Martha Scott to be added as a party plaintiff; and we were asked to so add her, and it was conceded that if this were done the first ground taken in the rule must fail.

I think we ought to make the amendment asked for, as the plaintiff is the person beneficially interested in the land, and Martha Scott is a mere bare trustee for him.

Blake v. Done, 7 H. & N. 465, is an authority for making this amendment under the 222nd section of the Common Law Procedure Act; and this case has been followed by the Court of Common Pleas in *Ogilvie v. McRory*, 15 C. P. 557, and in *Henderson v. White*, 23 C. P. 78; since which the Administration of Justice Act of 1873 has been passed, the 8th and 50th sections of which leave no doubt as to our power or the propriety of making it.

In support of the ground for a new trial the defendants file affidavits showing the discovery of the evidence of Alfred Dunn since the trial, but the affidavits do not shew that this evidence could not have been discovered before the trial, if the same means had been taken to discover it before the trial as have been taken since, nor do they shew that the defendants had before the trial made any enquiries, or taken any means to discover who the heirs of James Scott were. They also file the affidavit of Alfred Dunn, alleging that he is a son of Elizabeth Scott, who was a sister of James Scott, the effect of which allegation is that the plaintiff is only entitled to one undivided one half of the land in question, and that the heirs of Elizabeth Scott are entitled to the other undivided one-half.

Assuming this to be the case, I do not think we ought to grant a new trial to a defendant in ejectment in order that he may be enabled to prove, not that the plaintiff is not entitled to any interest in the land in question, but that he is only entitled to a moiety of it, and that a third person, with whom such defendant has no privity, is entitled to the other moiety; more especially when such defendant shews no title in himself, nor does he call any witnesses or give any evidence at the trial to shew that he is for any reason whatever entitled to any indulgence or consideration.

The amendment will therefore be allowed, and the rule discharged.

HARRISON, C. J., and WILSON, J., concurred.

Rule discharged.

TOBEY ET AL. V. WILSON ET AL.

Assessment—Alteration—Validity of—Court of Revision—Sittings of—Tender—Evidence.

The plaintiffs were entered upon the assessment roll for the year 1877, which was duly completed and delivered to the clerk of the municipality, for the total aggregate value of all their property and income at \$8,000, and on the 28th of April were served with the notice in accordance with 32 Vic. ch. 36, sec. 48, O., against which they did not appeal. At the first meeting of the Court of Revision on the 19th of May, a resolution was passed instructing the clerk to notify the plaintiffs amongst others, that they were assessed too low, but it did not appear that plaintiffs were ever so notified. On May 26th the Court of Revision again met, when a resolution was passed that the plaintiffs' assessment be laid over until the next meeting. After this second meeting the assessor, of his own motion, and without any authority therefor, altered the assessment to \$10,000, and delivered to the plaintiffs a second notice notifying them thereof. The plaintiffs' clerk happened to be present at the second meeting and heard plaintiffs' names mentioned, and on afterwards receiving the notice, supposed the matter was settled and thought no more about it. The Court of Revision, however, held a third meeting on June 2nd, and without any notice to plaintiffs, acting apparently under the belief that without such notice or an appeal by any one, they had authority so to do, raised the assessment to \$12,000.

Held, that under the circumstances neither the assessor nor the Court had any authority to alter the assessment roll, and therefore the increase was illegal and void.

By 37 Vic. ch. 19, sec. 11, O., the first sittings of the Court of Revision is directed to be held ten days after the time within which notice of appeal may be given; and section 12 provides that the notice must be given within fourteen days after 1st May, &c. *Held*, therefore, that the sittings on the 19th of May was illegal.

Held, also, that it was not essential that there should be a plea of tender of the proper sum, and evidence in support thereof; but even, if necessary, there was such plea and evidence.

THIS was an action of replevin for certain goods of the plaintiffs, distrained by the defendant Dickson, as the bailiff of the defendant Wilson, the collector of taxes for the village of Holland Landing for the year 1877, the sum distrained for being \$132, the amount of taxes appearing on the collector's roll of that village for that year as payable by the plaintiffs, and rated against them upon an alleged assessment of the aggregate value of all their property of twelve thousand dollars, which assessment the plaintiffs contended was illegal and void, under the circumstances hereinafter appearing.

The cause was tried before Galt, J., without a jury, at Toronto, at the Winter Assizes of 1878.

The assessor of the village for the year 1877 duly assessed the plaintiffs upon the assessment roll of the village for that year for a "total value of real property" at \$4,000, and for a "total value of personal property, other than income," at \$4,000, and for a "total value of real and personal property and taxable income," being "the aggregate value of all property" at \$8,000; and on the 28th of April delivered to the plaintiffs a notice of such assessment in the manner required by 32 Vic. ch. 36, sec. 48, O., and according to the form of schedule B annexed to that Act.

The assessor duly completed the roll, and duly delivered the roll so completed to the clerk of the village at the respective times prescribed by law for that purpose, and upon such assessment roll so completed and delivered, the plaintiffs appeared as assessed for the sum of eight thousand dollars in the manner above set forth, and against this assessment the plaintiffs made no appeal.

The first meeting of the Court of Revision, which was composed of the council, was held on the 19th of May: the second on the 26th of May; and the third on the 2nd of June, and at these meetings the following resolutions were passed.

Resolution of May 19th, 1877:

"The council instructed the clerk to notify the following persons as being assessed too low: D. S. Ross, Samuel Sexmith, Wm. Rubain, J. Sheppard, G. W. Wood, Mrs. J. Sheppard, John McKenzie, Sr., Mrs. Sutherland, A. J. Kenny, Wm. Robinson, and Warren Tobey & Co."

Resolution of May 26th, 1877:

"That Warren Tobey & Co's. assessment be laid over until the next meeting of this Council."

Resolution of June 2nd, 1877:

"That Warren Tobey & Co's assessment be raised two thousand dollars on personal property."

After the second meeting of the Court of Revision the assessor of his own motion, and without any authority for that purpose, altered the assessment of the plaintiffs on the assessment roll from \$8,000 to \$10,000, and delivered

to the plaintiffs a second notice shewing them assessed for the latter amount.

It was not clear upon the evidence whether the clerk ever notified the plaintiffs in pursuance of the resolution of the 19th May, and no evidence was given of what the contents of the notice were, if written, or to what effect it was, if verbal; and it in no way appeared when such notice was given.

All that the clerk said, was : "I am pretty certain I notified the agent of Mr. Tobey, Mr. Hutchinson, personally. I could not swear that I gave him a written notice."

Mr. Hutchinson, on the other hand, swore very positively that the clerk never gave him any notice whatever, either written or verbal.

At the second meeting of the Court of Revision Mr. Hutchinson was present, not, as he said, in consequence of any notice given with reference to the assessment, but casually as a mere idler: that while there he heard his employer's assessment mentioned: that after that meeting the second notice of assessment, increasing the plaintiffs' assessment to \$10,000, was served, and that he supposed the matter was settled, and never "bothered" about it.

No evidence was given to contradict Hutchinson's account of how he came to be present at that meeting, or to shew that he was present with reference to this assessment, or that he took any part in any discussion regarding it, or that he was present when it was "laid over;" or knew that it was laid over; and the only member of the Court of Revision examined at the trial, who was asked as to his presence at that meeting, was unable to say whether he was present at that meeting or not.

At the third meeting of the Court of Revision, there was no one to represent the plaintiffs, and it was not proved that the plaintiffs had any notice or knowledge that such meeting was to be held, or that anything affecting their assessment was to be transacted thereat.

The clerk said: "There was no appeal about this assessment. * * There was no appeal about that assessment from the Court of Revision or to it."

The Reeve for the present year said : " There was no appeal in reference to this assessment. We instructed the clerk at the first meeting to notify each person. No notice was produced to the Court of Revision, and no evidence taken or statement made. The council did this of their own accord. We thought the assessment too low, and went on and raised it to suit ourselves."

And the Reeve for the past year said : " There was no appeal. The Court looked through the roll, and saw there was an error, and we considered we had the authority to revise the roll."

It was admitted that the value of the goods distrained was \$200.

The learned Judge entered a verdict for the defendants.

In this Term, February 5, 1878, *McCarthy*, Q. C., obtained a rule *nisi* to set aside the verdict for the defendants, and to enter a verdict for the plaintiffs.

In the same Term, February 20, 1878, *McMichael*, Q. C., shewed cause, and cited *Scragg v. City of London*, 26 U. C. R. 263; *Cobbett v. Johnston*, 11 C. P. 317; *Great Western R. W. Co. v. Rogers*, 29 U. C. R. 245; *Nickle v. Douglas*, 35 U. C. R. 126; *Charleton v. Alway*, 11 A. & E. 993, 999.

Robinson, Q. C., contra, cited *Nicholls v. Cumming*, 25 C. P. 169, in appeal, 26 C. P. 323; *Municipality of London v. Great Western R. W. Co.*, 16 U. C. R. 500; *Regina v. Court of Revision of Cornwall*, 25 U. C. R. 286; *Maxwell on Statutes*, 237, 257, 333; *Cooley on Constitutional Limitations*, 3rd ed., secs. 402-6, 521, 574, 578; *Sedgwick on Statutory and Constitutional Law*, 2nd ed., 275, 304; *Potter's Dwaris on Statutes*, 325; *Rawlinson's Municipal Corporation Act*, 23; *Dillon on Municipal Corporations*, 2nd ed., vol. ii., sec. 643; *City of Lowell v. Wentworth*, 6 Cush. 225; *City of Nashville v. Weiser*, 54 Ill. 245; *Re Ford*, 6 Lansing N. Y. 92; *Noseworthy v. Buckland-in-the-Moor*, L. R. 9 C. P. 233; *Regina v. Justices of Middlesex*, L. R. 7 Q. B. 653; *Cuthbert v. Commercial Travellers Association*, 39 U. C. R. 578; *Coleman v. Kerr*, 27 U. C. R. 5.

March 15, 1878. ARMOUR, J.—After the assessment roll was completed and delivered by the assessor to the clerk, it could be altered by the Court of Revision only, and by them only in the manner prescribed by law.

I conclude from the evidence that the Court of Revision, when they passed the resolution raising the plaintiff's assessment, thought that they had the power to do so of their own authority, and without any notice to any one, and without any appeal having been made by any one in respect thereof.

By the assessment roll, as completed and delivered by the assessor to the clerk, the plaintiffs were assessed at \$8,000; by the assessment roll as finally passed by the Court of Revision they appeared to be assessed at \$12,000, \$2,000 having been in the meantime added by the assessor, and \$2,000 by the Court of Revision in the manner above related; and we are asked to hold that the assessment so increased from \$8,000 to \$12,000 is valid and binding upon the plaintiffs.

I do not see how we can hold such an increase so made to be otherwise than illegal and void.

It was not contended on the argument that the assessor had any authority to alter the roll as he did, nor could any pretence of law be urged in support of such a contention; but it was contended that the Court of Revision had power to do so, and that, at all events, the roll as finally passed bound the plaintiffs.

The Court of Revision is the creature of the statute constituting it, and its jurisdiction is limited to the exercise of the powers expressly given to it by the statute. Its function is judicial, and is to "try all complaints in regard to persons wrongfully placed upon or omitted from the roll, or assessed at too high or too low a sum": 32 Vic. ch. 36, sec. 58, O. Such complaints are only of any person complaining of an error or omission in regard to himself, &c.: 32 Vic. ch. 36, sec. 60, sub-sec. 1, O.; of a municipal elector thinking that any person has been assessed too low or too high, &c.: 32 Vic. ch. 36, sec. 60, sub-sec. 2;

37 Vic. ch. 19, sec. 12, O.; and of the assessor, where it appears that there are palpable errors which need correction: 32 Vic. ch. 36, sec. 60, sub-sec. 4, O.

In the case in hand there was no complaint by the plaintiffs against their assessment, nor by a municipal elector against it; and when the Court of Revision first met the time had gone by for making any such complaint, and the roll could have been altered thereafter only on the complaint of the assessor, under the following section: "When it shall appear that there are palpable errors which need correction, the Court may extend the time for making complaints ten days further, and may then meet and determine the additional matter complained of, and the assessor may, for such purpose, be the complainant:" 32 Vic. ch. 36, sec. 60 sub-sec. 4.

This is the only section which can be invoked in this case as capable of giving the Court of Revision any authority over the plaintiffs' assessment.

Passing over the question, whether in case a person is assessed for \$10,000 when he ought to be assessed for \$12,000, such is a "palpable error" any more than in case a person is assessed for \$12,000 when he ought to be assessed for \$10,000, would be, can the alteration made by the Court of Revision be supported under this section? for if not, it cannot be supported at all.

Under this section it was necessary that there should be a complainant, even if it were not essential that the assessor should be the complainant, there does not appear to have been any.

Under 32 Vic., ch. 36, sec. 60, sub-sec. 8, "The clerk shall prepare a notice in the form following for each person with respect to whom a complaint has been made," (and this applies to the section in review as well as to the other sections authorizing complaints.)

"Take notice, that you are required to attend the Court of Revision at ——— - on the ——— day of ——— in the matter of the following appeal.

"Appellant,

G. H.

"Subject :—That you are not a *bonâ fide* owner or occupant (or as the case may be.)"

"To J. K."

(Signed)

"X. Y.

"Clerk."

Sub-sections 9 and 10 of 32 Vic. ch. 36, sec. 60, provide for the service of such notice; and sub-section 11 provides that "Every notice hereby required, whether by publication, advertisement, letter or otherwise, shall be completed at least six days before the sittings of the Court."

These provisions, with regard to notice, are imperative. Such notice is the foundation of the jurisdiction of the Court, and, if these provisions have not been complied with, the Court have no authority to deal with the subject matter of the complaint.

I think that on the evidence before us there is no room to doubt that none of these provisions were complied with, and I think, therefore, that the Court had no jurisdiction to alter the plaintiffs' assessment; and having no jurisdiction to alter it, such alteration cannot be binding on the plaintiffs under 40 Vic. ch. 8, sec. 56, O.

I may here advert to the fact that the sitting of the Court of Revision on the 19th May was illegally held. 37 Vic. ch. 19, sec. 11, provides that "the first sitting of the Court of Revision shall not be held until after the expiration of at least ten days from the expiry of the time within which notice of appeals may be given to the clerk of the municipality." And sec. 12 provides that "the notice to be given to the clerk under 32 Vic. ch. 36, sec. 60, sub-secs. 1, 2, is to be given within fourteen days after the first day of May required for the return of the roll, or within fourteen days after the return of the roll, in case the same is not returned within the time fixed for that purpose."

It was further urged before us that there was no plea setting up a tender of the true amount payable by the plaintiffs; that no such tender was made, and that, without such tender, this action was not maintainable.

I do not think that, in a case like the present, such a tender was necessary; but it is clear on the evidence that

the plaintiffs offered to pay \$110, being the rates calculated on an assessment of \$10,000, to the collector before the distress, and that the collector refused to receive it or to take anything less than the \$132; and there is a plea on the record alleging a tender of \$110.

The rule should be absolute to enter a verdict for the plaintiffs; and as it was admitted on the trial that the value of the goods distrained was over \$200, there should be a certificate for full costs.

HARRISON, C. J., and WILSON, J., concurred.

Rule accordingly.

Regulae Generales.

On the 9th of February, A.D. 1878, a rule of Court, made under the provisions of section 12, R. S. O. ch. 39, was read, extending and continuing Hilary Term until Saturday, the 23rd of February, A.D. 1878, inclusive.

MEMORANDA.

During this Term, the following gentlemen were called to the Bar :—

GEORGE FERGUSSON SHEPLEY, WILLIAM JAMES CLARKE, WILLIAM EGERTON HODGINS, JAY KETCHUM, ROBERT SHAW, HAMILTON PARKE O'CONNOR, WILLIAM CAVEN MOSCRIP, JAMES JOSEPH ROBERTSON, DANIEL O'CONNOR, JOSEPH BAWDEN.

SITTINGS IN VACATION

AFTER HILARY TERM.

TAYLOR V. PARNELL.

Infant—Limitation of action—R. S. O. ch. 135, sec. 5.

Held, that under 21 Jac. I. ch. 16, sec. 7, an infant has six years after attaining his majority to bring an action for work and labour performed by him during his infancy; and that section 5 of R. S. O. ch. 135, in no way interferes with such right.

ACTION on the common counts for work and labour, &c.

Fourth plea: that the alleged cause of action did not accrue within six years before this suit.

Second replication to fourth plea: that when the said cause of action accrued the plaintiff was an infant within the age of twenty-one years, and continued such infant until three years before the commencement of this suit. And the plaintiff says that he is now twenty-four years of age, and that he commenced this suit within six years next after his attaining the age of twenty-one years.

Rejoinder: that the said causes of action in the said plea were for services and work alleged to have been done and performed by the plaintiff under a contract and engagement with the defendant: that at the time of entering into such engagement and of fulfilling the same, the plaintiff was over the age of sixteen years, and did not reside with his parents or with any guardian: that the said engagement was beneficial to him the said plaintiff, and during all the said time when he was so fulfilling the said engagement, and when the said several causes of action in the said plea accrued, he was by virtue of the

facts hereinbefore set forth, and of the statutes in that behalf, capable of suing on the same as if he were of legal age.

To this rejoinder the plaintiff demurred, on the grounds : That the plaintiff, though entitled to sue before the removal of the disability of infancy, has, after such removal, an additional period of six years within which to bring his action under the statute 21 Jac. I. ch. 16, sec. 7 : that the proviso in the said statute is a saving clause in favour of infants, and imposes no disability upon them in the matter of suing, and the fact that the plaintiff is entitled to sue during infancy, is no answer to the plaintiff's replication.

On March 5, 1878, the demurrer was argued.

S. R. Clarke for the plaintiff, cited R. S. O. ch. 135, sec. 5, p. 1199 ; *Forbes v. Smith*, 11 Ex. 161 ; *Darby & Bosanquet's* Statute of Limitations, 36, 103 ; *Simpson on Infants*, 61, 92-4.

McMichael, Q. C., contra.

March 12, 1878. GALT, J.—The question raised by the demurrer in this case is, whether an infant being within the provisions of R. S. O. ch. 135, sec. 5, is limited to six years within which to bring an action under that statute from the accruing of his right of action, or whether he has a period of six years after his attaining his majority to assert his right.

The 5th sec. is, "Where a minor over the age of sixteen years, who has no parent or legal guardian, or who does not reside with his parent or guardian, enters into an engagement written or verbal to perform any service or work, he shall be liable upon the same, and shall have the benefit thereof as if he had been of legal age."

Dr. McMichael contended that the effect of this statute was to do away with the disability of an infant, and to enable him to bring an action in his own name without being required to sue by his guardian or next friend, and therefore the Statute of Limitations should be held not to apply, as he was under no disability.

On the other hand, Mr. Clarke asserted that the statute was passed for the purpose merely of rendering an infant liable on his contract to perform work and labour, and to confer on him a right of asserting for his own benefit a claim for such service free from any interference by his parent or guardian.

I think this was clearly the intention of the legislature, I do not understand that there ever was a disability on the part of an infant to sue simply because he was an infant.

As was said by Pollock, C. B., in *Forbes v. Smith*, 11 Ex. 161, at p. 164, "In the case, which I suggested, of an infant, can it be said, that, if his guardian does not sue, the infant must wait until he is of age?"

In the Treatise on Limitations by *Darby & Bosanquet*, p. 36, it is said, "The 7th section of the Statute of James is a saving clause and of itself imposes no disability, and the plaintiff is at liberty to bring his action during the disability in any way he might have done if the Act had not passed, and that whether the six years have elapsed or not, and has in addition six years after the disability ended."

The judgment will be for the plaintiff on the demurrer.

Judgment for plaintiff.

CLARK V. ALLEN.

*Examination of party to cause—Refusal to answer—Motion for attachment—
Certificate of examination—Special report.*

In support of an application for a writ of attachment against a party for contempt in refusing to answer certain questions on an examination under the C. L. P. Act, R. S. O. ch. 50, or for his attendance to be examined at his own expense. *Semble*, that the copy produced of such examination should be a copy thereof certified under the hand of the examiner, and that a sworn copy is not sufficient.

Semble also, that before a witness can be rendered liable for contempt, the examiner must express his opinion as to the propriety of the witness's answering.

Under the Act it is provided : 1. If the party under examination demurs or objects to any question, such question and objection shall be taken down by the examiner and transmitted to the Court, who shall decide thereon. 2. If either party is dissatisfied with the conduct of any witness, he may require the examiner to make a special report to the Court, who shall make such order upon such report as justice may require. In this case neither of the above modes was adopted, and the writ of attachment was therefore refused.

Held also, that in the absence of such special report no order can be made for the witness attending to be re-examined at his own expense.

On January, 18, 1878, *G. B. Gordon* obtained a rule *nisi* calling on defendant to shew cause why a writ of attachment should not issue to attach the defendant to answer her contempt in refusing to answer certain lawful questions put to her on her examination herein before G. M. E., taken on 14th January, 1878, or why the defendant should not be ordered to attend at her own expense before the said G. M. E., at such time and place as he may in writing appoint, and submit to be examined herein *viva voce* on oath, and answer all proper questions, and why the defendant should not pay the costs of this application and such examination.

On March 5, 1878, *Hodgins*, Q. C., shewed cause.
G. B. Gordon, contra.

March 8, 1878. GALT, J.—Mr. Hodgins took several objections to this rule, but it is unnecessary to consider more than one.

He contended that the evidence before the Court was entirely insufficient, the only testimony of what took place being what purported to be a sworn copy of the original examination, and not a certified copy under the hand of the person taking the same.

The 165th sec. of C. L. P. Act, R. S. O. ch. 50, is as follows: "Wherever, by virtue of this Act, an examination of any party or parties, witness or witnesses, has been taken before any * * person appointed to take the same, the depositions taken down by the examiner shall be returned to and kept in the office of the Court * * in which the proceedings are carried on; and office copies of such depositions may be given out, and the examinations and depositions certified under the hand of the Judge or other officer or person taking the same, or a copy thereof certified * * as the case may be, shall, without proof of the signature, be received and read in evidence, saving all just exceptions."

If it were necessary to decide this point, I should incline strongly to the opinion that the objection is well taken. The statute has expressly enacted that the production of an office or certified copy shall be received and read in evidence, but it has made no provision for the reception of a sworn copy.

There is however a much more fatal objection, which is, there is no legal evidence that the refusal to answer the questions complained of, was objected to at the examination reported to the Court.

There is an affidavit made by the gentleman who conducted the examination stating, "that on said examination the defendant refused to say whether or not she used the slanderous words set forth in the declaration, except as to four persons whom she named. Her refusal, as appears on her examination, was wilful and deliberate. When asked the question there set forth by me, she would answer 'name your person,' and her counsel refused to allow her to answer the question, except as to the four persons named. I endeavoured on said examination, by asking the

question repeatedly and in different ways, to elicit the information sought by said question, but could not get a proper answer from the defendant, and it was only after seeing that the defendant was determined not to answer properly my question that I had the question and answer taken down in said examination."

By sec. 163: "If the party or person under examination demurs or objects to any question or questions put to him, the question or questions so put, and the demurrer or objection of the witness thereto, shall be taken down by the examiner, and be transmitted by him to the office of the Court, to be there filed; and the validity of such demurrer or objection shall be decided by the Court or a Judge."

By sec. 164, sub-sec. 3: "It shall be in the discretion of the examiner to put down any particular question or answer, if there appears to be any special reason for so doing, and any question or questions objected to shall at the request of either party be noticed or referred to by the examiner in or upon the depositions; and he shall state his opinion thereon to the counsel, attorneys, agents, or parties, and if requested by either party, he shall on the face of the depositions refer to such statement."

It appears to me that the latter part of this sub-section is very important, and that before any person can render himself liable to attachment for contempt in refusing to answer any question objected to, it is necessary that the examiner shall state his opinion on the propriety of the witness answering. It must be admitted that such a provision is very reasonable when we consider the number of persons daily examined under the provision of this Act. This was not attended to in this case.

Without admitting that the evidence of what took place on the examination in this case is properly before me, I refer to it merely to shew what is alleged to have been done, so as to exemplify my meaning. "Question—In speaking of the plaintiff, did you say to any person other than John Clark, that the plaintiff swore false in Toronto? Mr. Spragge (counsel for defendant) objects to any ques—

tion being put as to slander other than those alleged to have been spoken to Thomas Ellis, John Clark, Robert Campbell, and Mrs. Gracey, the plaintiff in his examination having sworn that the slanders complained of were spoken to these persons only. Answer—I made use of the language that I used as above to John Clark, Thomas Ells, and Mrs. Gracey. Robert Campbell was present at the interview between John Clark and me, I did not say to any of these four persons that Henry Clark swore false in Toronto. Beyond that I decline to answer the question further. Question—Did you, on any occasion within a month or two months after the trial of the case, Allen against Ellis, or the last assizes in Toronto, say of the plaintiff that he swore false in Toronto? Answer—Not to any of the four persons mentioned above. I decline to answer further.”

These two answers are those complained of. It does not appear that the learned examiner expressed any opinion as to the propriety or impropriety of the witness giving the answer which she did give, or refusing to answer further, and without such expression of opinion I do not think the witness can be blamed.

By the 166th sec., “Every Judge, officer or other person taking examinations under this Act, may, and if need be shall, make a special report to the Court in which such proceedings are pending, touching such examination and the conduct or absence of any witness or other person thereon or relating thereto; and the Court shall institute such proceedings and make such order upon such report as justice may require, and as may be instituted and made in any case of contempt of Court.”

This has not been done in this case.

The result of the best consideration which I have been able to give to the provision of the statute is, that on an examination there are two courses open to the parties.

First. If the party under examination demurs or objects to any question, such question and objection shall be transmitted to and decided by the Court, and the costs occasioned

by such demurrer or objection shall be in the discretion of the Court. Second. If either party is dissatisfied with the conduct of any witness, he may require the person taking the examination to make a special report to the Court, and the Court shall make such order upon such report as justice may require. Neither of these courses has been pursued, consequently this rule must be discharged, and with costs as it was moved with costs. The foregoing remarks apply to that part of the rule which applies to an attachment. It is true that Mr. Gordon on the argument stated that he did not press for an attachment, but I have thought it expedient to express my opinion on the subject.

As respects the alternative prayer, namely, that the defendant shall attend at her own expense for re-examination, I am of opinion, for the reasons before stated, that I am without any legal evidence of what took place. The only proper means of affording such information to the Court or a Judge, is pointed out by the 166th sec. It must be by the report of the examiner, and in the absence of such report I can make no order based on any previous examination.

The rule must be discharged, with costs.

Rule discharged.

THE MANUFACTURERS AND MERCHANTS MUTUAL FIRE
INSURANCE COMPANY V. THE CANADA GUARANTEE
COMPANY.

Deed of guarantee for plaintiffs' agent—Pleading—Averment of proof of loss.

The second count of a declaration, after referring to a deed set out in the first count, by which defendants covenanted to re-imburse to the plaintiffs any loss not exceeding \$600, which the plaintiffs should sustain by any act of fraud or dishonesty on the part of one H. who had been appointed the plaintiffs' agent—such re-imbursement to be made within three months after proof should be given to the satisfaction of defendants' directors of such loss—alleged that H. received and appropriated to his own use certain moneys of the plaintiffs: that the plaintiffs gave proof of their loss to defendants, and defendants thereupon repudiated all liability and alleged as a reason that the plaintiffs had forfeited all right under said deed by non-compliance with certain conditions not relating to such proof, and did not require any further proof of said loss, and thereby waived all further proof thereof by the plaintiffs, &c.

Held, on demurrer, that compliance with the deed in giving proof of the loss was sufficiently averred to call upon defendants to plead.

First count: For that by a deed or policy of guarantee bearing date, 1st March, 1876, and made between one Alexander C. Hartwell of the first part, the defendants of the second part, and the plaintiffs of the third part—wherein it was recited that the said Alexander C. Hartwell had been appointed agent in the service of the plaintiffs, and had been required to find security for the performance of his duties in the said situation, and that the defendants, in consideration of the sum of \$9 as the premium from the 1st of March, 1876, to the 1st of March, 1877, then therefor paid, and the sum or premium of \$9 thereafter to be therefor paid to the defendants, on or before the 1st of March, 1877, and in every succeeding year so long as the defendants should consent to receive it, had agreed, upon the terms and subject to the provisoes and conditions therein contained and endorsed thereon, thereby to become such security to the plaintiffs—the defendants upon the said terms, and subject to the said provisoes and conditions, covenanted with the plaintiffs to re-imburse unto them or their representatives or assigns the amount of any loss, not exceeding in the whole the sum of \$600, which, during the continuance of such deed or policy,

should be sustained by the plaintiffs by reason of any act of fraud or dishonesty of the said Alexander C. Hartwell in his said employment, such reimbursement to be made within three calendar months next after proof should be given to the satisfaction of the directors of the defendants of the occurrence of such loss.

And the plaintiffs say that afterwards, and whilst the said Alexander C. Hartwell continued in the said service of the plaintiffs as such agent as aforesaid, and whilst the the said deed or policy of guarantee was in full force and effect, the said Alexander C. Hartwell, as such agent, received for and on account of the plaintiffs certain moneys and securities for money amounting to a sum exceeding \$600 and did not duly and faithfully account to the plaintiffs for the same; but on the contrary thereof, fraudulently and dishonestly neglected and refused so to do, and by reason thereof, and of the fraudulent and dishonest conduct of the said Alexander C. Hartwell in not accounting to the plaintiffs for the said moneys and securities for moneys, and in his fraudulently and dishonestly appropriating the same to his own use, the plaintiffs sustained great losses, exceeding in the whole, the sum of \$600 in respect thereof; and the plaintiffs did, more than three calendar months before the commencement of this suit, cause proof to be given to the satisfaction of the directors of the defendants, of the occurrence of such loss. And all conditions were performed, &c., necessary to entitle the plaintiffs to a performance by the defendants of their said covenant, and to maintain this action for the breach thereof hereinafter alleged, and nothing happened or was done to prevent their maintaining the same; yet the defendants have not, nor has the said Alexander C. Hartwell, reimbursed or paid to the plaintiffs the said last-mentioned sum, or the amount of the plaintiffs' said loss, or any part thereof, and the same remains wholly unpaid and unsatisfied.

Second count: And also for that by the deed or policy of guarantee in the first count mentioned, the defendants

covenanted with the plaintiffs as in the first count alleged; and that afterwards, and whilst the said Alexander C. Hartwell continued in the said service of the plaintiffs as such agent as in the first count mentioned, and whilst the said deed or policy of guarantee was in full force and effect, the said Alexander C. Hartwell, as such agent, received for and on account of the plaintiffs certain moneys and securities for money amounting to a sum exceeding \$600, and did not duly and faithfully account to the plaintiffs for the same; but, on the contrary thereof, fraudulently and dishonestly neglected and refused so to do, and by reason thereof and of the fraudulent and dishonest conduct of the said Alexander C. Hartwell in not accounting to the plaintiffs for the said moneys and securities for money, and in his fraudulently and dishonestly appropriating the same to his own use, the plaintiffs sustained great losses, exceeding in the whole the sum of \$600 in respect thereof; and the plaintiffs did, more than three calendar months before the commencement of this suit, cause proof to be given to the defendants of the occurrence of such loss; and the defendants thereupon repudiated all liability to the plaintiffs in respect of the claim herein sued for, and alleged as a reason for so doing that the plaintiffs had forfeited all right to claim under said policy, by failing to comply with the second and third conditions thereof, which conditions did not in any way relate to the giving of the proof aforesaid, and the defendants did not require any further proof to be given by the plaintiffs of the occurrence of the said loss, and thereby waived all further proof thereof by the plaintiffs, and in all other respects all conditions were performed, &c., necessary to entitle the plaintiffs to a performance by the defendants of their said covenant, and to maintain this action for the breach thereof hereinafter alleged, and nothing happened or was done to prevent their maintaining the same; yet the defendants have not, nor has the said Alexander C. Hartwell, reimbursed or paid to the plaintiffs the said last-mentioned sum or the amount of the plaintiffs' said loss, or any part

thereof, and the same remains wholly unpaid and unsatisfied.

To the second count of the declaration the defendants demurred, on the grounds:

That the acts alleged as a waiver of the conditions precedent, that proof of the alleged loss should be made to the satisfaction of the directors of the defendants' company before the loss should become payable, do not in law amount to waiver.

That it appears on the face of the pleading, the first and second counts being incorporated by the introductory words of the second count, that proof of the alleged loss has not been made to the satisfaction of the defendants' directors required by the policy declared on.

That the policy declared on being a deed, its terms could only be varied or waived by deed, and the facts stated and relied on as amounting to a waiver, are not stated to have been by deed.

On March 12th, 1878, the demurrer was argued.

E. Martin, Q. C., for the defendants, referred to 14 & 15 Vic. ch. 36, sec. 28; *Workman v. Royal Ins. Co.*, 16 Grant 185; *Kelly v. Isolated Risk, &c., Ins. Co.*, 26 C. P. 299; *Thames Iron Works Co. v. Royal Mail Steam Packet Co.*, 13 C. B. N. S. 358; *Scott v. Niagara District Mutual Ins. Co.*, 25 U. C. R. 119; *Mulvey v. Gore District Mutual Ins. Co.*, 25 U. C. R. 424; *Stadhard v. Lee*, 3 B. & S. 364; *Andrews v. Belfield*, 2 C. B. N. S. 779; *Scott v. Corporation of Liverpool*, 25 L. J. N. S. Ch. 227; *Solvency Mutual Guarantee Co. v. Froane*, 7 H. & N. 5; *Stickney v. Niagara District Mutual Ins. Co.*, 23 C. P. 372; *Abrahams v. Agricultural Mutual Assurance Association*, 40 U. C. R. 175; *McMath v. Confederation Life Association*, 36 U. C. R. 459.

MacKelcan, Q. C., for the plaintiffs, referred to *Canada Landed Credit Co. v. Canada Agricultural Ins. Co.*, 17 Grant 418; *Moore v. Woolsley*, 4 G. & B. 243, 256; *Braunstein v. Accidental Death Ins. Co.*, 1 B. & S. 782; *May on*

Insurance, pp. 572-7; *Sansum's Dig. of Insurance*, 1105-1119; *Mason v. Andes Ins. Co.*, 23 C. P. 37; *Blake v. Exchange Mutual Ins. Co.*, 12 Gray 265.

March 15, 1878. GWYNNE, J.—In my opinion the defendants have been premature in demurring, as they have done, to the second count of the declaration.

If the count could be read as containing an averment of the fact of waiver by the defendants of all proof of the occurrence of the alleged loss, and if such proof were a condition precedent to the accrual to the plaintiffs of their cause of action, still the count would not be open to demurrer, for in a declaration, wherein less certainty is required than in a plea or subsequent pleading, it is sufficient to aver the fact of waiver simply without saying it was by deed, and if a deed be necessary and is not proved, the plaintiffs would fail to establish their averment of waiver.

In an action upon a guarantee which, within the provisions of the Statute of Frauds, must be in writing, it is not necessary to aver in the declaration that it was in writing.

So here if this count did contain an averment of the fact of waiver of all proof, that must be taken as implying a sufficient waiver in a declaration, and one by deed where it can only be by deed, and the defendants by demurring would admit the waiver, and could not, upon the argument of their demurrer, be heard to contend that what they had admitted as a fact was not alleged to have been executed in a form to make it good in law. See the observations of Martin, B., in *Solvency Mutual Guarantee Co. v. Froane*, 7 H. & N. 5, at p. 13.

Where a waiver in fact is relied upon in a declaration, it lies upon the defendants to allege that it was not by deed, if a deed be necessary to its validity.

But the count does not, as it seems to me, make any averment of a waiver in fact. Under the words "thereby, &c., &c.," the pleader must, I think, be regarded as having contemplated drawing a conclusion of law from the

precedent matters of fact alleged, and the conclusion drawn is, that the facts alleged constitute in law a waiver of all *further* proof. What the object of drawing this conclusion was, I fail to see, for there is nothing alleged from which it can be gathered that any necessity was imposed upon the plaintiffs to furnish any *further* proof than that which had already been averred had been furnished, namely, proof of the occurrence of the loss. If the plaintiffs furnished defendants with proof of the occurrence of the loss, that surely is *primâ facie* good, and until the defendants set up by plea that what the plaintiffs rely upon as proof, was either no proof at all or was insufficient, the averment is sufficiently large to comprehend complete proof.

All that could be required in a case of this nature is such proof as should satisfy reasonable men: *Moore v. Woolsey*, 4 E. & B. 243; *Braunstein v. Accidental Death Ins. Co.*, 1 B. & S. 782.

The case of *Andrews v. Belfield*, 2 C. B. N. S. 779, and other cases of that class to which I was referred, have no application in a case of this nature.

Now the facts which are alleged in the second count, and which the demurrer admits, are, that a loss within the covenant occurred—that the plaintiffs furnished the defendants with proof of its occurrence, and the defendants did not require any further proof, but repudiated liability upon a wholly different ground. Now without these two latter averments, namely, that the defendants did not require any further proof, &c., &c., sufficient, as it appears to me, is averred to call upon the defendants for a defence.

But I do not see that the second count varies much from the first. The facts alleged in the second seem rather to be matters to be relied upon in evidence for the purpose of drawing the inference that the defendants were satisfied with the proof furnished, as is alleged in the first count, and I do not see that the second count advances the plaintiffs' remedy one iota, for if the defendants should set up as a defence to the first count, that no proof at all or no sufficient proof of the occurrence of the loss was furnished,

it would be still necessary for the plaintiffs to reply that the defendants were furnished with such proof as ought to have satisfied reasonable men, and from which the inference may be drawn that they were satisfied.

Whether the supplying the defendants with proof of the occurrence of the loss, is or not a condition precedent, is a point which can be raised better when we see the whole deed than upon this demurrer.

In *Braunstein v. Accidental Death Ins. Co.*, Wightman, J., at p. 795 of 1 B. & S. 782, seemed to be of opinion that a similar clause was rather directory as between the shareholders and directors of the company, than a clause amounting to a condition precedent to the right of the assured to recover.

Although I think there is sufficient alleged in the second count to call upon the defendants to plead, and this is all that it is necessary to decide upon this demurrer, it appears to be highly probable upon the pleas coming in, it will be found that in reality the second count varies so little from the first, that no purpose whatever is served by the second count, and then it may be proper for the defendants to move to have it struck off the record; but as against this demurrer, I must hold that the count sufficiently discloses a cause of action entitling the plaintiffs to recover, unless displaced.

The judgment will be for the plaintiffs.

Judgment for the plaintiffs.

HOPKINS V. THE MANUFACTURERS AND MERCHANTS MUTUAL FIRE INSURANCE COMPANY.

Mutual insurance policy—Avoidance by fraud—Waiver by subsequent assessment.

To a declaration on a policy of insurance in a Mutual Company defendants pleaded that the plaintiff induced them to enter into the contract by representing and warranting to them certain facts relative to the insured premises, material to be made known to defendants and to the risk, which were false and fraudulent, whereby the policy was avoided. A further plea, after setting up the representation and warranty as in the former plea, averred that the plaintiff promised and agreed that the premises should continue as represented and warranted, and that in the belief that he would perform the same the defendants made the policy, but that, after the making thereof, the plaintiff ceased to keep the premises in the condition represented and warranted, thereby increasing the risk, whereby, &c. To each of these pleas the plaintiff replied by way of estoppel that after such representation and warranty, and after the loss, and after defendants had acquired full knowledge of the breach and falseness of said representation and warranty, defendants levied an assessment on the premium note given by plaintiff to cover losses by defendants to a date named, before which day the plaintiff had sustained said loss; and notified him that unless such assessment should be paid within thirty days his insurance would be void; and that within said thirty days he paid and defendants received said assessment.

Held, on demurrer, replications good, as shewing that defendants, with full knowledge of the breaches of warranty had elected, as they might, to treat the insurance as existing.

Declaration on a policy of insurance dated 7th December, 1876, for three years, for \$600, namely:

Furniture, Wearing Apparel, &c.	\$450
China, Earthenware, &c.	100
Liquors and Cigars,	50
	<hr/>
	\$600

The premium whereof was paid partly in cash and partly by premium note, and which said policy was subject to the statutory conditions and variations thereof of the Fire Insurance Act of 1876, endorsed thereon, alleging a loss by fire, and performance of all conditions precedent.

Fourth plea: That the said plaintiff, in order to induce the defendants to enter into the said alleged contract of insurance in the declaration mentioned, then represented and warranted to the defendants of and concerning certain facts and circumstances material to be made known to the

defendants in order to enable them to judge of the risk about to be undertaken, as follows: that the stoves used in the building wherein the property to be insured was then situate, as in the declaration mentioned, were in good order, and that the pipes leading therefrom and connecting therewith were in good order, and that the said pipes did not pass or come near to the wood of the said *building*; and the defendants relying upon the said representation and warranty, made the policy in the declaration mentioned, which said representation and warranty were false and fraudulent to the knowledge of the plaintiff, whereby the said policy became and is void.

The fifth plea repeated the allegations in the fourth plea down to the word *building*. It then proceeded: and then promised and agreed with the defendants that during the currency of the said policy the same should continue as represented and warranted as aforesaid. And the defendants relying upon the said promise and agreement of the plaintiff, and believing that the said plaintiff would perform the same, made the policy in the declaration mentioned; and the said plaintiff, after the making of the said policy and before the said loss, and without the knowledge or consent of the defendants, and contrary to his promise and agreement, ceased to keep the said stoves and pipes in the condition represented and warranted as aforesaid, thereby increasing the risk, whereby the said policy became and is void.

To the fourth plea the plaintiffs replied that the defendants ought not to be admitted to say that the policy in the declaration mentioned became or is void by reason of any of the matters in the fourth plea alleged, because that after the representation and warranty in that plea mentioned, and after the loss by fire in the declaration mentioned, and after the defendants had acquired, as in fact they had, full notice and knowledge of the breach of the said warranty and representation and of the falseness of the same, the defendants passed a resolution in writing to levy an assessment, and did levy an assessment of \$14.40 on the

premium note given by the plaintiff in respect of his said insurance, and to cover losses by the said company from the 7th December, 1877, to the 7th December, 1878, before which period, to wit, on the 1st June, 1877, the plaintiff had sustained the said loss, and made the same payable by the plaintiff to the defendants at the office of the company in Hamilton, within thirty days next after notice of the same to the plaintiff. And the defendants afterwards, and before the commencement of this suit, duly gave notice to plaintiff of the said assessment, and that unless the same should be paid by the plaintiff within the said period of thirty days, the plaintiff's said insurance would become void. And the plaintiff within the said period of thirty days, and before the commencement of this suit, duly paid to the defendants the said amount, and they duly accepted and received the same, and still retain the same, whereby the defendants waived the said avoidance of the said policy, and renewed and continued the same. Wherefore the plaintiff prays judgment if the defendants ought to be admitted to say that the said policy and the insurance thereby effected be came void by reason of any of the matters in the fourth plea alleged.

There was a similar replication to the fifth plea.

To these replications the defendants demurred, on the grounds: that upon the policy becoming void as in the said fourth and fifth pleas stated, the premiums represented by the premium note in the second replication mentioned became forfeited to the defendants, and the amount of the same was properly payable by the plaintiff upon assessment notwithstanding the said policy having become void.

The receipt of the same or the acts of the defendants mentioned in the said replications do not amount to a waiver of the conditions of the policy mentioned in the plaintiff's declaration, or any of them, nor are the defendants estopped by assessment and receipt of premium after loss.

On April 5, 1878, the demurrers were argued.

J. H. Ferguson, for the defendants, cited *Angell* on Insurance, 2nd ed., pp. 462-4; *New Hampshire Mutual Ins. Co. v. Rand*, 4 Foster N. H. 428; *Lyons v. Globe Mutual Ins. Co.*, 28 C. P. 62; *Merritt v. Niagara District Mutual Ins. Co.*, 18 U. C. R. 529.

Osler, contra, referred to *Smith v. Mutual Ins. Co. of Clinton*, 27 C. P. 441.

April 12, 1878. HAGARTY, C. J.—If the first plea in question here be true, that the policy was obtained by a false warranty, &c., and was void, the risk never attached, and the relations of assurers and assured never subsisted between the parties.

It seems to me therefore that it is impossible to maintain such a plea against the facts stated in this replication, viz., that with full knowledge the defendants assessed the plaintiff for losses extending over a period long subsequent to the loss. With or without knowledge, I hardly see that they can be heard urging in one breath that the plaintiff was never insured with them, and that he is still liable to pay his premium note.

The other plea confesses a binding contract to have been entered into, but avoids it on a subsequent breach of warranty in a matter material to the risk.

The point then presented is this, can they with full knowledge that the policy has so become void be allowed to treat it as void from the breach of warranty, and at the same time demand and receive an assessment for a period extending for a long time after the loss?

I think they may rightfully insist on the plaintiff paying his contributions to the general losses, &c., up to the time when, as they insist, his policy became void. But it is here admitted that after the loss occurred, and after defendants had full knowledge of the alleged breaches of warranty, &c., they demanded and received this assessment covering the period long after the loss.

I am of opinion that the defendants could waive, if they pleased, any such forfeiture as this plea alleges.

I also think that they cannot now be heard insisting on such forfeiture.

I read the Act, R. S. O. ch. 161, as providing for the co-existence of protection and liability.

Section 47 provides for the liabilities on premium notes. The directors may assess "to meet the losses and other expenditures of the company *during the currency of the policies for which said notes or undertakings were given, and in respect to which they are liable to assessment*; and every member * * shall pay the sums from time to time payable by him * * *during the continuance of his policy.*" This is the main provision as to assessment of premium notes.

Section 48 avoids the policy if the assessment be not paid within the named time as respects losses during the time of non-payment, but allows revival on payment by consent of the defendants. "But nothing shall relieve the assured party from his liability to pay such assessment or any subsequent assessments, nor shall such assured party be entitled to recover for any loss or damage which happens * * while such assessment remains due and unpaid, unless the board * * decide otherwise."

I do not accede to the argument that the words "any subsequent assessments" extend the right to assess during the whole period for which the premium note extends, and (as here) for many months after the defendants repudiate all liability on the assurance. The words may properly refer to the current or any subsequent assessment found necessary during the period while the plaintiff continued to be assured with the company. Even if they do not strictly bear this meaning, I cannot hold them as altering what I understand to be the general scope of the Act.

Under section 41, the policy is avoided by alienation by sale, insolvency, or otherwise, and shall be surrendered to the company (except by consent as provided), and thereupon the assured shall be entitled to receive his deposit note on payment of his proportion of all losses and expenses *which had accrued prior to such surrender.* But if the

assignment be to a mortgagee, the policy may, by arrangement, be allowed to remain in force without a fresh premium note, and the existing note shall continue unaffected.

Again, section 44 allows the company to cancel any policy on giving a certain notice, but the insured shall nevertheless be liable to pay his proportion of the losses and expenses of the company *to the time of cancelling the policy, &c.*

By section 40, on notice of an additional insurance the company may dissent, and "the liability of the insured on the premium note or undertaking shall cease from the date of such dissent on account of *any loss which may occur to such company thereafter.*"

I think the general intention of the Act and of the contracting parties is clear, that so long as a man is insured by the company he is, as it were, a joint adventurer with all the other persons insured, to bear his proportion of losses. Whenever he ceases to be so insured, he has of course no claim on the common stock for any subsequent loss he may sustain, and the common stock, in like manner, has no further claim for contribution on him. The mutual relation was thenceforth dissolved.

It is provided (sec. 51) that an action lies for an assessment not paid within the thirty days, and that suing therefor shall not be a waiver of the forfeiture by non-payment.

It is not necessary for me to discuss the practice that seems to be prevalent of assessing in the middle of a year for the whole of that year. The great bulk of losses for the year might occur in the last half of the year after a loss had been incurred and paid, and the whole claim on a policy satisfied.

The case of *Lyons v. Globe Mutual Ins. Co.*, 28 C. P. 62, in this Court, is very distinguishable from the present in the facts that appeared in evidence.

I decide against the defendants on the ground that the company having full knowledge of certain alleged breaches of warranty as to management of stove pipes, &c., elected,

as I consider they lawfully could, to treat the insurance as existing, by calling on the plaintiff to pay an assessment for a long period after acquiring such knowledge, and notified him to pay within a named time, or that in default of payment his insurance would become void. This is treating him as still insured. It is true that the assessment is stated to have been made after the loss (it does not say after knowledge of the loss). But on this pleading we need not consider anything that may come out in evidence as to the manner in which the defendants accepted and received the payment from the plaintiff, nor with what knowledge or under what circumstances the assessment was placed on him and notice given to him. On this record the plaintiff might, I presume, recover for a partial loss. I think the replication answers the plea.

As I read the pleadings the assessment stated could not have been that of 10 per cent. per annum allowed by section 53 to form a reserve fund.

The judgment will be for the plaintiff on both the replications.

Judgment for plaintiff.

EASTER TERM, 41 VICTORIA, 1878.

*(From May 20th to June 8th.)**Present :*

THE HON. ROBERT ALEXANDER HARRISON, C. J.

“ “ ADAM WILSON, J. *

“ “ JOHN DOUGLAS ARMOUR, J.

PARSONS V. THE CITIZENS' INSURANCE CO.

Fire insurance—39 Vic. ch. 24—Absence of conditions—Averment of in declaration—Estoppel—Prior insurance—Valuation—Omission of jury to answer question—Misdirection—New trial refused.

A policy of insurance, issued after 39 Vic. ch. 24, did not contain the conditions made necessary by that statute: *Held*, that the fact of the declaration having stated that the policy was subject to conditions, which it set out, did not preclude the plaintiff from contending there were no conditions upon the policy, for an amendment would be allowed in order to state the contract proved according to its legal effect.

Plaintiff having represented his loss at a much larger sum than the jury found he had sustained, the Court nevertheless refused to interfere on this ground, as the jury at the same time found that he acted honestly in making the representation, and the evidence in the opinion of the Court sustained that finding.

The omission to communicate the fact of an existing insurance with another company is not *per se* such a wrongful concealment as to sustain a plea of fraud; and where, as in this case, the plea is not rested on any ground of breach of warranty, but on a misrepresentation of facts material to the risk, the materiality is a matter depending on evidence, and there being no evidence on that point here, the Court also refused to interfere.

Excessive valuation does not avoid a policy, unless shewn to have been excessive to the knowledge of the assured.

The mere omission of the jury to answer one of the questions submitted to them is no ground for a new trial; but whether the omission of the jury should have that effect, where the verdict is that of the Judge, must depend on the nature of the question and the character of the evidence bearing upon it, whether the question be an unnecessary one or one going to the foundation of the recovery, and the evidence as to it contradictory.

Held, that it was no misdirection to leave to the jury the question of value of property destroyed, although the same had been found by arbitrators under the condition of the policy; first, because there was no condition affecting either this or any other matter; secondly, because, even if there were, the award could not be held to be valid, inasmuch as the arbitrators had received no evidence and turned the parties out of the room during the investigation.

* Was absent on leave.

THIS was an action on a fire policy, dated 4th of May, 1877, insuring the plaintiff to the amount of \$2,500 on the plaintiff's building, partly two and partly three stores, built of wood, with brick front, covered with gravel and shingles, situate on the south side of Broadway in the Town of Orangeville, occupied as a general hardware store, from the 6th of March, 1877, to the 6th of March, 1878.

The declaration contained the usual statements as to the policy, conditions, loss, interest, &c. There were also the common indebitatus counts.

Pleas—1. *Non est factum*.

2. Policy obtained by fraud.

3. Misrepresentation as to other insurances, the representation being that there was no other insurance, whereas there was one in the Western Insurance Company for \$1,000.

4. Misrepresentation as to value.

5. Fraudulent claim as to the amount of the loss.

6. Double insurance without notice to defendants.

7. Prior insurance without defendants' consent thereto appearing on the policy.

8. That gunpowder over twenty-five pounds was kept on the premises without consent of the defendants.

9. Traverse of the loss.

10. Never indebted, to the common counts.

Replications—1. Issue.

2. No such conditions as in the sixth and seventh pleas alleged.

3. Condition mentioned in sixth plea not a statutory condition.

Rejoinder—issue on the second replication to the sixth and seventh pleas.

Demurrer to the several replications to the sixth plea.

Joinder in demurrer.

Exceptions to the sixth plea.

Postponement of judgment on the issue in law till the determination of the issues in fact.

The issues in fact were tried at the last Assizes for the

County of Wellington, before Patterson, J. A., with a jury.

The policy was admitted. It was signed at Montreal on the 4th of May, 1877. There were conditions subjoined, but they did not profess to be statutory conditions of the Province of Ontario.

The application for the insurance, signed by the plaintiff, was also proved. To the question "What other insurance, if any, is there upon the property, and at what office?" the answer was, "No."

The facts were, that at the time there was an insurance in another insurance company for \$1,000 on the building, but the plaintiff supposed it was on stock. The building was valued in the application at \$5,000.

The building was destroyed by fire on the night of the 3rd of August last.

The plaintiff sent in his proof papers to the defendants on the 13th of August last, by which he represented that his loss amounted to \$4,600.

The loss at the trial was variously estimated from \$2,398, up to \$4,000.

There was no evidence that the existence of another insurance was material to the risk or material to be known to the defendants.

Plaintiff and his clerk swore he had not more than 25 pounds of gunpowder, on the insured premises, at any one time, but the company relied upon a supposed admission and some other evidence to the contrary.

Application was made to amend the pleas, so as to allege a warranty as to value and a breach of it, but this was refused and referred to the Court.

All the evidence shewed the valuation to have been excessive.

The sixth and seventh issues were left to the decision of the Court.

One of the conditions to which the policy on the face of it was subject, provided for an arbitration to determine the amount of the loss. Arbitrators were appointed under this condition, and estimated the loss at \$2,398, exclusive

of fixtures, and at \$3,806.50, including fixtures; but the arbitrators received no evidence, and turned the plaintiff out of the room where the arbitration was being held.

It was contended that the plaintiff was bound by this arbitration, and that the learned Judge should have so directed the jury.

The learned Judge left certain questions to the jury, and these with their answers are subjoined.

1. Did the plaintiff, by fraud, procure the defendants to make the policy? Ans. No.

2. At the date of the application, viz., 26th March, 1877, was the insured building of the cash value of \$5000? Ans. No.

3. Did the plaintiff know the building was not of the cash value of \$5000? No answer.

4. What was the amount of the plaintiff's loss by fire upon the building insured? Ans. \$3,629.

5. When the plaintiff represented his loss at \$4,600, was the representation made honestly on his part, or was it made with intent to deceive and defraud the defendants? Ans. Honestly.

6. Had the plaintiff, at the time of the fire, more than 25 pounds of gunpowder in the insured building? Ans. No.

7. Had more than 25 pounds of gunpowder been kept or stored in the building at any time after the 4th May, 1877? Ans. No.

The learned Judge thereupon entered a verdict for the plaintiff for \$2,575.

M. C. Cameron, Q. C., 23rd May, 1878, obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had between the parties, said verdict being contrary to law and evidence, and for excessive damages, and misdirection of the learned Judge, there having been further insurance on the property not notified to defendants, powder in prohibited quantities kept on the premises, fraudulent representation as to the

value of the premises insured in the application for insurance, and on warranty of insurance contained therein, and in the claim made afterwards; and which said misdirection was in leaving to the jury the question as to the value of the building, when the same was determined by arbitration under a condition of the policy; or why the verdict should not be reduced to the sum of \$2,398, or such other sum as to the Court should seem just.

F. Osler, (*M. McCarthy* with him,) 31st May, 1878, shewed cause. The third plea is no answer: *McDonell v. Beacon Fire and Life Ins. Co.*, 7 C. P. 308; *Laidlaw v. Liverpool and London Ins. Co.*, 13 Grant 377. The 4th plea is one of fraud, and it is answered by the verdict of the jury: *Riach v. Niagara District Mutual Ins. Co.*, 21 C. P. 464; *Chaplin v. Provincial Ins. Co.*, 23 C. P. 278; *Dickson v. Equitable Fire Ins. Co.*, 18 U. C. R. 246; *Hawke v. Niagara District Mutual Ins. Co.*, 23 Grant 149. The Court will not interfere with the verdict of the jury unless such as to shock the conscience: *Newton v. Gore District Mutual Ins. Co.*, 33 U. C. R. 92. The arbitration was a mere valuation, and *McInnes v. Western Ins. Co.*, 5 P. R. 242, shews the distinction between an arbitration and a valuation.

M. C. Cameron, Q. C., contra, cited *Riach v. Niagara District Ins. Co.*, 21 C. P. 464; *Elliott v. Royal Ex. Ass. Co.*, L. R. 2 Ex. 237; *Scott v. Avery*, 5 H. L. 811; *Williamson v. Commercial Union Ass. Co.*, 25 C. P. 453; *Shannon v. Hastings Mutual Fire Ins. Co.*, 25 C. P. 470.

June 29, 1878. HARRISON, C. J.—The defendants are incorporated under a special Act of Parliament of the Dominion of Canada.

The policy of insurance issued by them to the plaintiff was so issued after the passing of the Provincial Act 39 Vic. cap. 24, and does not contain the conditions made necessary by the statute.

We have decided in this Court that Insurance Companies incorporated by the Dominion Parliament are, as regards

insurances effected by them in this Province, bound by the Provincial Statute, and subject to all the consequences of non-compliance with its provisions : *Ulrich v. The National Ins. Co.*, 42 U. C. R. 141.

We have also decided in this Court that a policy of insurance issued after the passing of the Act, but not in compliance with its provisions, is to be deemed, *as against the assured*, as a policy without any conditions : *Frey v. Wellington County Mutual Ins. Co.*, 43 U. C. R. 102.

But it was argued for the defence that, as the declaration sets out that the policy is subject to conditions, and sets out the conditions, the assured is concluded from contending that there are no conditions upon the policy.

We do not appreciate the force, if any, of this argument. Variances between the declaration on contract, and the written contract, when produced, are of every day occurrence. No one in such a case ever argues that the plaintiff is precluded by the contract as alleged. On the contrary, amendments to meet the variances between the contract alleged and the contract proved, are allowed almost as a matter of course.

We see no objection to the plaintiff being allowed to amend, if he see fit, his declaration to suit the contract proved, according to its legal effect.

This disposes of the fifth sixth, seventh, and eighth pleas in favour of the plaintiff, for upon each of them the plaintiff has taken issue, and each alleges a condition which, according to the decisions of this Court, does not, as against the assured, in law exist on this policy, when produced.

Besides, some of these pleas have on other grounds been found, and we think properly found, against the defendants.

The fifth plea alleges a false and fraudulent claim in this, that the plaintiff represented his loss to be \$4,600, whereas it was much less.

Although the jury may have estimated the plaintiff's loss at only \$3,629, they have at the same time said he acted honestly in making the representation which he did, and the evidence in our opinion sustains that finding.

The eighth plea alleges that the plaintiff kept a larger quantity of gunpowder on the insured premises than 25 pounds, but the jury have answered in the negative. The weight of evidence, we think, supports this finding.

The first plea, which is *non est factum*, was, subject to the suggested amendment, rightly found for the plaintiff.

The ninth plea, which traverses the loss, was also rightly found for the plaintiff.

Nothing turned upon the common counts or the pleas thereto.

The only remaining pleas to the first count are the second, third and fourth.

The third plea alleges that the plaintiff misrepresented a fact material to the risk, that is to say, that there was no other insurance on the property, whereas there was another insurance for \$1,000.

The omission to communicate, at the time of the proposal for an insurance, the fact that there is an insurance already effected with another company is not *per se* such a wrongful concealment as to sustain a plea of fraud : *McDonell v. The Beacon Fire and Life Ass. Co.*, 7 C. P. 308.

The plea is not rested on any ground of breach of warranty. It alleges a misrepresentation of a fact material to the risk. Whether material to the risk or no was a question of fact depending upon the evidence. The onus was on the defendants to adduce evidence. There was no evidence that the misrepresentation alleged was material to the risk. In the absence of any evidence the verdict was properly found for the plaintiff on that plea.

The rule *nisi* does not ask for leave to amend the plea, so as to convert it into a plea of breach of warranty ; but, as we have no reason to doubt the *bona fides* of the plaintiff's demand, we would not feel inclined, even if asked, to assist the defendants in such an attempt to defeat the demand of the plaintiff. See *Benson v. The Ottawa Agricultural Ins. Co.*, 42 U. C. R. 282.

The only pleas remaining are the second and fourth. They are in effect the same. The second plea alleges that

the defendants were induced to make the policy by the fraud of the plaintiff. The fourth plea is, that the plaintiff in his application for the insurance represented that the property insured was of the cash value of \$5000, whereas it was of a much less cash value, *as the plaintiff well knew*.

The mere fact of an overvaluation does not avoid the policy: *Laidlaw v. The Liverpool and London Ins. Co.*, 13 Gr. 377. It can only have that effect, under such pleas as pleaded here, where it is shewn to have been excessive to the knowledge of the applicant. *Riach v. Niagara District Fire Ins. Co.*, 21 C. P. 464; *Newton v. Gore District Mutual Fire Ins. Co.*, 33 U. C. R. 92; *Chaplin v. The Provincial Ins. Co.*, 23 C. P. 278; *Redford v. Mutual Fire Ins. Co. of Clinton*, 38 U. C. R. 538.

The questions raised under these pleas were pure questions of fact for the consideration of the jury, in the event of the learned Judge leaving the questions to them for determination.

The learned Judge, however, availed himself of the provisions of sec. 264 of Revised Stats. Ont., cap. 50, and instead of directing the jury to give either a general or special verdict, submitted certain questions to the jury, and upon receiving the answers to all the questions except one, himself rendered a verdict for the plaintiff for \$2,575.

The verdict moved against is therefore the verdict of the Judge and not of the jury, and the question is, whether that verdict ought to be disturbed. See *Mann v. English*, 38 U. C. R. 240, 254; *Moore v. Connecticut Mutual Life Ins. Co.*, 41 U. C. R. 467, 514.

The answers which the jury have given to the questions submitted, are of course on the present application subject to review on the evidence; but the mere fact that the jury omitted to answer one of the questions submitted is not of itself a ground for a new trial. Whether the answer of the jury should have that effect, where the verdict is that of the Judge, must depend on the nature of the question, and the character of the evidence bearing upon it.

If it appear to the Court that the question was an unnecessary one, because covered by some other question which the jury have answered, the verdict may, we think, be allowed to stand, notwithstanding the omission of the jury to answer the particular question.

On the other hand, if it appear that the question is one going to the foundation of the recovery, and the evidence as to it is contradictory, the Court, as the law stands, has, we apprehend, no power for the purposes of that question to put themselves in the place of the jury, and answer the question in the place of the jury.

The second plea pleaded is, that the defendants were induced to make the policy sued upon by the fraud of the plaintiff. The fraud relied upon to sustain the plea was the misrepresentation of the plaintiff as to the value of the property. He represented the value to be \$5000, whereas it was much less. If he knew such was an excessive value, we may assume he was guilty of fraud. The jury in answer to the first question, "Did the plaintiff by fraud procure the defendants to make the policy," say "no," and yet, for some unexplained reason, omit to answer the third question, "Did the plaintiff know the building was not of the cash value of \$5000?" The answer to the first question involves the answer to this question. The question was, therefore, in our opinion, unnecessary, and the failure to answer it is of no importance, except as particularly directing our attention to the evidence affecting the answer of the jury to the first question.

The learned Judge, whose verdict is moved against, informs us that he did not insist upon an answer to the third question, because he considered it covered by the first and the answer thereto.

The learned Judge very fully explained to the jury the difference between a false and a fraudulent representation, and we have no reason, apart from the omission to answer the third question, to suppose that the jury did not understand the learned Judge. We cannot think the omission to answer that question is attributable to ignorance of the

jury as to what was necessary to constitute fraud. We may therefore accept their answer to the first question in all its integrity, regardless of the omission to answer the third question.

The finding of the jury, if warranted by the evidence, disposes of the second and fourth pleas in favour of the plaintiff.

Having read the evidence we do not feel disposed to quarrel with the finding of the jury. Many men honestly believe their own property to be of more value than others, and except, perhaps, when asked by an assessor as to value, usually overstate its value.

The rule *nisi* next complains of misdirection on the part of the learned Judge in leaving to the jury the question as to the value of the building, when the same had been determined by arbitrators under the conditions of the policy.

There are at least two answers to this contention. The first is, that there is no condition on the policy affecting this or any other matter. The second is, that if there were the condition supposed, we never could hold an award to be valid where it is shewn that the arbitrators received no evidence, and turned the parties to the arbitration out of the room during the investigation. The arbitration usually intended by such a condition is not, as the arbitrators erroneously supposed, a mere valuation. See *McInnes et al. v. Western Ass, Co.*, 6 P. R. 242. The so-called award was, in our opinion, a perfect nullity.

If the learned Judge had told the jury, in assessing the damages, to pay any attention to it, he would, we think, have misdirected the jury. His leaving the question of loss to the jury, irrespective of the arbitration proceedings, cannot therefore be deemed misdirection.

We cannot say that the amount at which the jury did estimate the loss was excessive. There was evidence which would have justified a finding for a greater amount. There was evidence which would have justified a finding for a less amount. We cannot say the jury were obliged

to adopt either the highest or lowest estimate. The truth, in all probability, was found, as it often is, between two extremes.

ARMOUR, J., concurred.

Rule discharged.

PARSONS V. THE QUEEN INSURANCE COMPANY.

Fire insurance — Interim receipt — Prior assurance — Notice of — Statutory conditions.

In an action on an interim receipt for insurance against fire, it appeared that the application represented that there were four further insurances, but had not correctly stated the amount insured in the different companies, but annexed to the application and delivered to the company's agent at the same time, was a memorandum giving them accurately:

Held, that the memorandum was part and parcel of the application, and the agent having received and accepted the premium, must be taken to have assented to it, and his act, under the circumstances, be held, so far as the interim receipt and the right of the plaintiffs thereunder were concerned, to be the act and assent of the defendants.

The interim receipt stated that the plaintiff was insured subject to all the usual terms and conditions of the company:

Held, that, treating the receipt as subject to the statutory conditions, the 8th condition, as to the assent of the company appearing in or being indorsed on the policy, had been sufficiently complied with.

Held, also, that the 13th statutory condition, requiring the assured to give notice of his loss and to deliver "as soon afterwards as practicable" a particular account, was complied with by delivering such account within a reasonable time.

Observations on the duty of counsel when dissatisfied with the ruling of the Judge at Nisi Prius.

ACTION on an interim receipt for insurance against fire, dated 3rd August, 1877, on general stock of hardware, paints, oils, varnishes, window glass, stoves, tinware, castings, hollow-ware, plated fancy goods, lamps, lamp glasses, and general house furnishing goods, to the extent of \$2000, for the period of twelve months from date.

The interim receipt, which was set out in the declaration, was as follows: "Fire department, Interim protection note, Queen Fire and Life Insurance Company, Chief Office, Queen Insurance Buildings, Liverpool; Canada Head office, 191 St. James street, Montreal. No. 33—The Queen Insurance Company, Orangeville Agency, 3rd August, 1877. Mr. William Parsons having this day proposed to effect an insurance against fire, subject to all the usual terms and conditions of this company, for \$2000, on the following property, in the town of Orangeville, for twelve months, namely, &c., (describing the property as above), and having also paid the sum of \$40 as the premium on the same, is hereby held assured under these conditions until the policy is delivered, or notice given that the proposal is declined by the company. N. B.—The deposit will be returned, less the proportion for the period, on application to the agent signing the note, in the event of the proposal being declined by the company. If accepted, a policy will be prepared and delivered within thirty days. If the holder does not receive a policy during the specified period, he should apply to the head office, Montreal."

The declaration, after setting out the interim receipt, set out the terms and conditions to which the policy of insurance of the defendants' company was usually subject, and then averred a loss, interest, &c.

There were also the common *indebitatus* counts.

The pleas to the first count were :

1. Did not promise.
2. Denial of the agency of Mr. Kirkland, who signed the interim receipt.
3. Non-payment of premium money.
4. That the plaintiff did not, within fourteen days after the happening of the loss, furnish proofs as required by the conditions of the policy.
5. Other insurances in existence, at the time of the granting of the receipt, not notified to the defendants, contrary to the conditions of the policy. (The other insurances alleged were \$900 in the Canada Farmers Insurance Com-

pany, and \$1000 in the Canada Fire and Marine Insurance Company.)

6. Other insurance without the assent of the defendants, contrary to the conditions of the policy.

7. Gunpowder exceeding ten pounds, and rock oil exceeding five gallons, contrary to the conditions of the policy.

8. Gunpowder in excess of ten pounds kept on the premises after issuing of the receipt, contrary to the conditions of the policy.

9. Gunpowder in excess of twenty-five pounds, and rock oil in excess of five gallons, contrary to a condition of the policy.

10. Storing excessive quantities of gunpowder and rock oil without assent of defendants, contrary to a condition of the policy.

11. A similar plea to the last, in a more special form.

12. Same, but alleged as a breach of the statutory condition.

13. Arson.

14. That the plaintiff did not furnish such proofs as required by the statutory condition as to proofs.

15. Never indebted, to the common counts.

Issue.

The issues were tried at the last Spring Assizes for the county of Wellington, before His Honour the County Judge, acting for Paterson, J. A., and a jury.

The insurance was effected through Mr. Kirkland, agent for the Merchants' Bank at Orangeville, and the local agent of the defendants at that place.

The application for the insurance was made to him by the plaintiff either on the 2nd or 3rd of August last. It was in writing. The stock in the application was represented to be of the value of \$17,000, and it was also represented that there were further insurances on the stock to the amount of \$8,000, that is to say, \$2,000 each in the Victoria Mutual, the Scottish Commission, the Lancashire, and the Standard.

The aggregate amount of the other insurances was right,

but they should have been distributed as follows: \$1,000 in the Victoria Mutual, \$1,000 in the Quebec, and \$2,000 each in the remaining companies.

Annexed to the application, when produced from the custody of the defendants, was a written memorandum in the handwriting of the plaintiff's book-keeper, giving the correct distribution of the additional insurances. Plaintiff swore it was annexed to the application at the time he gave the application to the agent, but the agent had no particular recollection of it.

The agent was called as a witness for the plaintiff. He proved that he received the premium, \$40, during the afternoon of the 3rd of August, 1877, and gave the receipt for the premium at the time of the payment; and that the premium money had been transmitted to the defendants and not returned.

The fire took place on the night of the 3rd of August, 1877, about ten o'clock. The stock was nearly all destroyed by the fire. The plaintiff was not at home at the time the fire began. There was nothing to shew that the fire was otherwise than accidental. There was no evidence whatever as to its origin.

The plaintiff had been receiving large supplies of stock up to and on the day of the fire. He estimated his loss at \$14,000. The usual amount of insurance which he had on his stock of hardware was \$10,000. This was known to the agent of the defendants when he accepted the risk. Plaintiff arrived at the amount of his loss by taking the amount of his stock at stock-taking on 1st September previous, then adding the purchases up to the time of the fire, and deducting the amount of the sales after deducting profits. The book-keeper agreed with him in the estimate.

The plaintiff was under the impression that under the conditions of the policy he might have at least twenty-five pounds of gunpowder and a barrel of coal oil. He admitted having had more than ten pounds, but less than twenty-five pounds of gunpowder: he said about twenty pounds. He swore that at the time of the application he

had less than the allowed quantity of oil, and there was no testimony to the contrary.

The plaintiff had at the time of the fire an insurance in the Canada Farmers' Insurance Company for \$900 on machinery and tools, patterns, plant, and stock, in the tin workshop. The stock described in this policy was wire, copper, and tin. The evidence shewed that these were not known as hardware, and were not intended to be covered by the risk in the defendants' company.

There was also an insurance in the Canada Fire and Marine Insurance Company on the stock of sheepskins, hides, wool, and stoves, contained in a frame storehouse, not covered by the risk in the defendants' company.

On the 3rd of September, 1877, about a month after the fire, the plaintiff wrote and forwarded to the defendants his claim. There was no objection made to it as insufficient upon any ground.

This action was commenced on the 18th of March, 1878.

The defendants, at the close of the plaintiff's case, moved for a nonsuit on the following grounds :

1st. That there was a further insurance without notice.

2nd. That the building contained a greater quantity of gunpowder than ten pounds at the time of the fire.

3rd. Non-delivery of proof within the time allowed by the statute.

The learned County Judge decided to take the opinion of the jury as to the quantity of gunpowder on the premises at the time of the fire.

The jury found that there were not twenty-five pounds of gunpowder in the store at the time of the fire.

The learned County Judge then entered a verdict for the plaintiff for \$2,070.

M. C. Cameron, Q. C., 23rd May, 1878, obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered, or why the verdict should not be set aside and a new trial had between the parties, said verdict being contrary to law and evidence, and for

misdirection of the learned Judge, there being further insurances on the property insured, a greater quantity of gunpowder contained on the premises containing the insured goods than permitted by, and contrary to the terms of, the defendants' contract with the plaintiff, and the proof of loss required by the contract not having been furnished in due time; and which said misdirection was in telling the jury there was no question for them except the quantity of gunpowder on the premises.

F. Osler, M. McCarthy with him, 31st May, 1878, shewed cause. Defendants must be confined to the statutory conditions, for if a policy issued under a bill filed, it would only issue in this way; the only defence open therefore arises under these conditions.

As to the further insurance, this was not on the same property. Then as to the gunpowder, it is admitted that there was an excess of ten pounds. As to the proof of loss not being furnished within a reasonable time, it is inequitable now to raise the defence. He referred to *Hawke v. Niagara District, &c. Ins. Co.*, 23 Gr. 139, 147; *Patterson v. Royal Ins. Co.*, 14 Gr. 169; R. S. O. ch. 162.

M.C. Cameron, Q.C., J. T. Small, with him, 1st June, 1878, contra. The interim receipt is not a policy. The company are not by it to give the statutory conditions, but only the conditions of their policy. *Penley v. Beacon Ass. Co.*, 7 Grant 130; *Davis v. Canada Farmers' Mutual Ins. Co.*, 39 U. C. Rs. 452. As to further insurance being indorsed on receipt, 23 Grant 139; *Hendrickson v. The Queen Ins. Co.*, 31 U. C. R. 54. As to the twenty-five pounds of gunpowder, *Patterson v. The Royal Ins. Co.* 14 Grant 169. As to the pleadings, *Billington v. Provincial Ins. Co.*, 2 App. R. 174; *Coulthard v. Royal Ins. Co.*, 39 U. C. R. 409; *Hawke v. Niagara District Mutual Fire Ins. Co.*, 23 Grant 140, 150; *Morrow v. Waterloo County Fire Ins. Co.*, 39 U. C. R. 441.

29th, June, 1878. HARRISON, C. J.—It is quite clear that the local agent at Orangeville had, on 3rd August,

1877, power, upon receipt of the premium money, to bind the defendants by an interim insurance, "subject to all the usual terms and conditions of the company," and it is equally clear that the premium money was paid to the agent.

If the company had, before the fire or before action, issued a policy with their usual conditions, such as proved at the trial, and these not the statutory conditions required in this Province, we would, under previous decisions in this Court, have been obliged to hold that the policy was, as against the assured, one without conditions of any kind: *Ulrich v. The National Ins. Co.* 42 U. C. R. 141; *Frey v. Wellington County Mutual Ins. Co.*, 43 U. C. R. 102.

Before the recent changes in the administration of the law, the remedy of the plaintiff, not having before action received his policy of insurance, would have been to have filed a bill in the Court of Equity, either to compel the delivery of a policy in accordance with the requirements of the receipt, or to ask for an order for the payment of the insurance money as if a policy had been in fact issued: See *Penley v. The Beacon Ins. Co.*, 7 Grant 130; *Patterson v. The Royal Ins. Co.*, 14 Grant 169; *Hawke v. The Niagara District Ins. Co.*, 23 Grant 139; *Wyld v. London Liverpool and Globe Ins. Co.*, 21 Grant, 458, S. C. 23 Grant 442.

Assuming that we are right in holding, as we have held, that a policy issued by an Insurance Company after the passing of the Act as to uniformity of conditions, with conditions other than statutory conditions, is, as against the assured, to be deemed a policy without conditions of any kind, we doubt if any Court would, on a bill to compel the issue of a policy, order the issue of a policy with any other than the statutory conditions.

If a policy with any other than the statutory conditions were issued, the defendants would, according to the decisions in this Court, be in a much worse position than if the policy were issued with the statutory conditions.

The counsel for the plaintiff have argued this case as if

the interim receipt were subject to the statutory conditions, and this is putting the case in the most favourable view possible in the interest of the defendants.

We shall therefore proceed to decide the case on this footing.

The eighth statutory condition is as follows: "The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is endorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until the company assents thereto by writing, signed by a duly authorized agent."

If there be prior insurances there must be the assent of the company, and in the event of the issue of a policy, that assent must appear in the policy, or be endorsed thereon.

Where no policy is issued there can be no assent to such insurances, either appearing *therein* or endorsed *thereon*; but it is only reasonable to hold that even an interim insurance is not binding in the face of such a condition, unless there be not only notice of the prior insurances, but the assent of the company thereto in and by their agent authorized to effect interim insurances.

The evidence shews that the risk in the Canada Fire and Marine Insurance Company is not on the same property as is covered by the risk of the defendants, and that the whole amount of such prior insurances was \$8000. The application, through some mistake, does not properly name the several companies which held the prior assurances, or distribute the amounts, but the written memorandum annexed to the application, and which the plaintiff swears was delivered to the agent at the same time as the application, and which the agent does not positively deny, gave the correct information. If the paper annexed was given to the agent at the same time as the application, and on the evidence we must assume it was part and parcel of the application, and so conveyed to the agent of the defendants full and correct information as to the prior insurances,

the agent, having received it, and afterwards accepted the premium money and issued the interim receipt, must be taken to have assented to it, and his act under the circumstances must, so far as the interim receipt is concerned, and the rights of the plaintiff thereunder, be held to be the act and the assent of the defendants.

It is true, as mentioned by Proudfoot, V. C., in *Hawke v. Niagara District Mutual Fire Ins. Co.*, 23 Grant 148, that the indorsement of assent might be made on the interim receipt instead of the policy, but to decide that the want of the indorsement on the interim receipt shall vitiate the claim thereunder, would, we think, be placing too rigorous a construction on the interim contract.

The tenth statutory condition provides that the company is not liable for the losses following, that is to say, for loss or damage occurring while petroleum, rock, earth or coal oil, camphine, burning fluid, benzine, naptha, or any liquid products thereof, or any of their constituent parts (refined coal oil for lighting purposes only, not exceeding five gallons in quantity, excepted), or more than twenty-five pounds weight of gunpowder are stored or kept in the building insured or containing the property insured, unless permission is given in writing by the company.

There was no evidence that, either at the time of the application or at the time of the fire, there was an excess of coal oil, and the only evidence which there was of an excess of gunpowder, by reason of a supposed admission made by the plaintiff, and which he denied, was left to the jury, who believed the testimony of the plaintiff, and we think on the evidence rightly did so.

The thirteenth statutory condition is as follows: "Any person entitled to a claim under this policy is to observe the following directions.

(a) "He is forthwith after loss to give notice in writing to the company.

(b) "He is to deliver, as soon afterwards as practicable, as particular an account of the loss as the nature of the case permits."

The words, "as soon after as practicable," mean within a reasonable time : *Cammell v. The Beaver Mutual Ins. Co.*, 39 U. C. R. 1 ; and there was no dispute but that the plaintiff had delivered his proofs as soon as practicable, or within a reasonable time. It was not asked by counsel for the defendants that any question on this point should be submitted to the jury, and we suppose for the reason that there could only be one answer to the question on the evidence, and that an affirmative one.

The rule complains that the learned County Judge misdirected the jury, in stating that there was no question for their consideration except the quantity of gunpowder on the premises ; but no objection was made at the time to this direction, and if any such was made, there is not now any substantial question of fact suggested which ought to have been submitted to the jury with the slightest prospect of a finding thereon in favour of the defendants.

The least counsel can do, when dissatisfied with the ruling of the Judge at *Nisi Prius*, is promptly to express the dissatisfaction, and, if necessary, respectfully press it upon the presiding Judge, with a view if possible to changing the opinion of the Judge on the spot, or, failing that, with a view to ulterior proceedings. See *Whitehouse et al. v. Hemment*, 27 L. J. Ex. 295, 297 ; *Regina v. Wilkinson*, 42 U. C. R. 513.

We infer, from the official report of the proceedings at the trial, that the verdict moved against is the verdict of the learned County Judge and not the verdict of the jury, and that, the better to decide the case, he, under the statute, availed himself of the service of the jury, in order to decide the only real contested matter of fact in the whole case.

We do not discover any ground, either upon the law or evidence, for setting aside the verdict, and so discharge the rule.

ARMOUR, J., concurred.

Rule discharged

FRAZEE ET AL. V. MCFARLAND ET AL.

Promissory note—Married woman—Separate estate—Liability as indorser.

A married woman, possessed of separate estate, acquired by her after the Married Woman's Act of 1872, indorsed a note for the accommodation of her husband, member of a firm to whom credit was given on the faith of such separate estate and her indorsement in reference thereto :

Held, that she was liable.

Kerr et al. v. Stripp, 40 U. C. R., affirmed.

ACTION on a promissory note made by the defendants George McFarland and Joseph A. McFarland, trading under the name of George and Joseph A. McFarland, dated the 6th of May, 1876, payable to the order of the plaintiffs, for the sum of \$1,276 95, four months after date, and endorsed by the defendants Anna Maria McFarland and Thomas A. Keefer.

The makers of the note allowed judgment to be entered by default.

The defendant Keefer pleaded the ordinary traverses.

The defendant A. M. McFarland, among other pleas, pleaded that at the time the note was endorsed she was the wife of the defendant George McFarland ; that she endorsed the note for the accommodation of the makers without any consideration, and that she did not endorse in respect of any employment or business in which she was engaged on her own behalf.

Plaintiffs replied that, at the time of the endorsement of the promissory note, the defendant was possessed of real and personal property acquired by her after the passing of the Married Woman's Property Act of 1872, and that such real and personal estate were not affected by the trusts of any settlement, and that the endorsing of the promissory note was the separate contract of the defendant, and made by her respecting her separate estate aforesaid.

Issue.

The issues were tried at the last Chancery Sittings at St. Catharines, before Proudfoot, V. C.

The marriage between defendant and her husband George McFarland, was proved to have been solemnized in 1867.

The defendant afterwards, by the death of her father, on 12th January, 1873, in common with her brothers and sisters, inherited a large amount of real and personal property.

This was by deed, dated 11th July, 1874, partitioned among the heirs of the deceased. The defendant and her husband were parties to the deed, and the portion conveyed to her was, with his assent, conveyed to her separate use.

The makers of the note, including defendant's husband, on 6th March, 1876, made an agreement to purchase from the plaintiffs, who resided in the State of Illinois, a large number of pumps at reduced prices, for sale in Canada.

The dealings between the parties were not mutually satisfactory, and on 26th May, 1876, a new agreement was made, the price of the pumps to be payable in United States Currency, at four months from date of shipment, notes to be given for the amount of such shipment on the receipt of the invoice thereof, such notes to be made by George and J. A. McFarland, and endorsed by the defendant Anna Maria McFarland and Thomas A. Keefer, as sureties for the firm.

Plaintiffs had discovered that George McFarland had no property, and that his wife had a great deal of property. The object of the agreement of 26th May, 1876, was to get the security of the wife for pumps to be furnished by plaintiffs to the makers of the note.

The note sued upon, for \$1,276.95, was made and endorsed under and pursuant to this agreement.

The learned Vice-Chancellor found a verdict for the plaintiffs for \$1,395 64, being the amount of the note and interest.

James A. Miller, 20th May, 1878, obtained a rule calling on the plaintiffs to shew cause why the verdict entered against the defendant Anna Maria McFarland, should not be set aside, and a verdict entered for her, upon the ground

that the evidence shewed that the said defendant was a married woman, and the endorsement by her was an accommodation endorsement for her husband and another, and was not a contract entered into by her on account of her separate estate, or upon which she could be held liable.

McClive, 30th May, 1878, shewed cause. The woman was married in 1872, the property acquired afterwards. The 35 Vic. ch. 16, O., is applicable here: *Kerr v. Stripp*, 24 Gr. 198, S. C. 40 U. C. R. 125; *Adams v. Loomis*, 22 Gr. 99, S. C. 24 Gr. 242.

Miller, contra. The question is, whether a married woman is liable on an accommodation note not made in any business. He cited, in addition to the cases already referred to, *Darling v. Rice*, 1 App. R. 46, 48.

29th June, 1878. HARRISON, C. J.—It is clear that the married woman in this case was proved to have been possessed of separate estate at the time of the endorsement of the note; that such separate estate was acquired by her after 1872, and that credit was given to the firm, of which her husband is a member, upon the faith of her separate estate, and her endorsement in reference to it.

The only defence raised on her behalf is, that as the endorsement was not for her own benefit, but only as surety for the firm of which her husband is a member, she is not in law bound by the endorsement.

It has long since been held in England that a married woman possessed of separate estate, has as much power, as regards that estate, to contract as *a feme sole*, and that she may bind her separate estate for general engagements made for a valuable consideration, although in such engagements in no manner referring to her separate estate. See *Vaughan v. Vanderstegen*, 2 Drew. 165, 182; *Mathewson's Case*, L. R. 3 Eq. 781; *Butler v. Crumpston*, L. R. 7 Eq. 16.

And this is held to be the law under our Married Woman's Act of 1872: *Lawson v. Laidlaw*, Court of Appeal. (a)

(a) Not yet reported.

It has also long since been held in England that there is nothing to prevent a married woman becoming surety for her husband, or for any other person, to the extent of her separate estate: *Stanford v. Marshall*, 2 Atk. 68; *Hulme v. Tenant*, 1 Br. C. C. 20; *Heatley v. Thomas*, 15 Ves 596. And this is also held to be the law under our Married Woman's Act of 1872: *Kerr et al. v. Stripp*, 40 U. C. R. 125, S. C., 24 Grant 198.

It has been repeatedly held in the Courts of this Province that wherever a bill will, in equity, lie against a married woman and her husband to charge her separate estate, an action at law may, under the operation of our statute, be maintained against her on her separate contract, without joining the husband for the purpose of such action. See *Wagner v. Jefferson*, 37 U. C. R. 560.

The husband here is not sued in respect of the contract of his wife, but, under the statute as to bills and notes, in respect of his own contract, as one of the makers of the note. See *Holcomb v. Hamilton*, 12 C. P. 38, S. C., 2 Er. & Ap. 230.

Where a married woman, either at law or in equity, assumes to act in reference to her separate estate, the question is not whether her action is wholly for her own benefit, for the right to act and bind her estate carries with it the right to act unwisely and to her own detriment, if she so wills. See *Corn Exchange Ins. Co. v. Babcock*, 1 Am. 601.

In this respect there can be no substantial difference between a contract of suretyship signed by a man, a single woman, or a married woman having separate estate.

In *Kerr et al v. Stripp*, 40 U. C. R. 134, we said, "While the Legislature has seen fit to confer the power, it is not for the Courts to limit the responsibilities arising from its exercise. * * * It is not for the Courts to question the wisdom of the Legislature. It is rather for the Courts to interpret the laws, leaving to the Legislature the right to move forwards or backwards, as the exigencies of society appear to demand."

The only point raised for decision in this case is, in our opinion, concluded by authority.

ARMOUR, J., concurred.

Rule discharged

PRINGLE V. THE CORPORATION OF THE TOWN OF NAPANEE.

Christianity part of the law of the country.

Held, that Christianity in general, and not simply the tenets of particular sects, is part of the recognized law of this Province, and therefore that to an action for breach of contract to let a public hall, a plea setting up that the purpose for which said hall was intended to be used was for the delivery of certain lectures containing an attack upon the fundamental doctrines of Christianity was a good defence.

THE declaration was for breach of an agreement to give the plaintiff the use of the Town Hall in the town of Napanee, for public lectures to be delivered there on the evenings of 15th, 16th, and 17th September, 1874, the plaintiff having paid therefor the sum of seven dollars and fifty cents for each night.

The defendants pleaded, among other pleas, that after the making of the alleged agreement the defendants were informed and learned for the first time that the plaintiff intended to use the said hall for certain irreligious, blasphemous, and illegal lectures, whereupon the defendants, within a reasonable time, after satisfying themselves of the truth of the premises, gave notice to the plaintiff that they could not permit the plaintiff the use of the said hall for the purposes aforesaid, and in like manner, within such reasonable time as aforesaid, tendered to the plaintiff the amount of the moneys which the plaintiff had paid them for the intended use of the hall.

Issue.

The issue was tried before Moss, J.A., at the last Fall Assizes at Napanee, without a jury.

The contract was proved. After the making of the contract the plaintiff advertised the lectures. The advertisement was as follows:

“LIBERAL LECTURES.—First appearance in Canada of B. F. Underwood, the celebrated Liberal lecturer. By special engagement and request this distinguished Freethinker, who is now in New England, has consented to visit Napanee on his way to the Pacific Coast in September, and give a course of three lectures on Theology and scientific free thought. The lectures will be delivered in the Town Hall, Napanee, on Tuesday, Wednesday, and Thursday evenings, September 15th, 16th, and 17th, commencing at seven and a half o'clock. Subject of first night: ‘Evolution v. Creation.’ As Darwinism is accepted by almost every scientist of eminence in Europe and America, and is receiving the serious attention of educated men everywhere, this lecture will be exceedingly interesting. Subject, second night: ‘What liberalism offers as a substitute for Christianity’. To those who have never examined this question, and who assert that Rationalists have no fixed standard of action, no moral principles or laws to guide and regulate human conduct, this lecture will be a source of enlightenment. Subject, third night: ‘Fallacies and Assumptions of Theologians regarding the Bible and Christianity.’ All who believe in hearing both sides of a question are cordially invited to attend. A philosopher has said that “he who *will* not reason is a bigot, he who *cannot* is a fool, and he who *dares* not is a slave.” And Milton says: ‘The right to think, to know, and to utter, is the dearest of all liberties. Without this right there can be no liberty to any people: with it there can be no slavery.’ John Wesley says, ‘Every wise man will allow others the same liberty of thinking that he desires they should allow him.’ And Bishop Watson declares, ‘Whosoever is afraid of submit-

ting any question, civil or religious, to the test of free discussion seems to me to be more in love with his own opinions than with truth.' 'Was there ever so abominable a fellow? He (the controvertist) exposes truth so odiously; he sets before our eyes the arguments on both sides with horrible impartiality; he is so intolerably clear and plain, that he enables people who have only common sense to doubt, and even to judge.'—*Voltaire*. 'Let truth and falsehood grapple.'—*Milton*.

Contrary to the usual practice, when eminent lecturers are engaged, we have determined to admit the public to these lectures free, and there will be no collection."

After the advertisement appeared there was a petition presented to the council of Napanee, asking them to prevent the use of the town hall "for a purpose with which the majority of the ratepayers can have no sympathy, and which cannot fail to be attended with mischievous consequences to many."

A counter petition was also presented to the council.

The council, on 7th September, 1874, passed a resolution prohibiting the use of the town hall for the purpose of the lectures, and this resolution, with an offer to return the money paid, was communicated to the plaintiff on the 8th September, 1874.

The plaintiff was then obliged to procure another hall in the town for the purpose of the lectures, which he did at a cost of \$125.

The lectures were delivered by Mr. Underwood in the latter hall, on the several nights for which they were advertised. He, at the first lecture, advocated the truth of Evolution, or the gradual development of everything from the simple to the complex. This doctrine he advanced in opposition to the doctrine of special creation contained in the Bible. He, at the second lecture, advocated what he called Liberalism as a substitute for the doctrines of Christianity, but not for the moral doctrines it inculcated. The third lecture was on the so-called fallacies of theologians

respecting the Bible and Christianity. He denied the inspiration of the Bible. He said the arguments advanced by theologians about the Divinity of Christ, were a mistake. He denied that God created the universe. He said the Bible was fabulous and false. He said he did not believe in Christ as a Divine being, or as a Saviour.

The learned Judge, having reserved his judgment, afterwards, upon the authority of *Cowan v. Milbourn*, L. R. 2 Ex. 230, entered a verdict for the defendants. He thought it better to follow that decision, leaving it to the Court to determine whether that case truly states the English law, and, if it does, whether such a law is applicable to this Province.

Bethune, Q. C., 21st May, 1878, obtained a rule calling on the defendants to shew cause why the verdict should not be set aside and a verdict entered for the plaintiff for \$125, and why, as regarded the plea of illegality, there should not be judgement for the plaintiff *non obstante veredicto*.

W. A. Reeve, 31st May, 1878, shewed cause.

The case of *Cowan v. Milbourn*, L. R. 2 Ex. 230, establishes that in England such lectures as these are unlawful.

It will be contended that the law as laid down in that case is not applicable to Canada, because there is no established church here. That decision, however, rests upon the fact that Christianity is a part of the Common Law of England, without reference to any church establishment.

The statute 9 & 10 Wm. III, cap. 32, came into force in this Province under our Constitutional Act, 32 Geo. III. ch. 1, but it did not alter the Common Law. It only provided new penalties for utterances which were already illegal at Common Law. Even if those penalties are now removed, it does not follow that such utterances are lawful, so as to entitle a person to have the assistance of the Courts to enforce a contract founded upon such a con-

sideration. Prostitution is not *per se* punishable, yet the Court will not enforce a contract of which it forms an element.

The question has been decided in the United States by so eminent a jurist as Chancellor Kent, in the case of *The People v. Ruggles*, 8 Johnson 291. It was held that, though there is no established church in the United States, yet Christianity was introduced into the country as part of the Common Law of England, and a conviction for blasphemy, in using grossly offensive language in reference to Christ, was sustained,

The result of the authorities is, that to publicly deny the truth of the Christian religion, or the inspiration of the scriptures, is unlawful, in two different senses, according to the kind of language used. If the language is of an offensive or malicious character, the speaker is indictable. See *Taylor's Case*, 1 Ventris 293; *Rex v. Woolston*, Fitzgibbon 64; *Regina v. Hetherington*, 5 Jur. 529.

If Christianity is held not to be a part of the law of the land, so as to render these lectures unlawful, it follows that any person may, in this country, utter the grossest blasphemies with impunity, because the unlawful character of the language in the one case, and the indictable character of it in the other, are both founded on one and the same proposition, namely, that Christianity is a part of the law of the land.

As to the Act respecting Rectories, Consol. Stat. C. ch. 74, sec. 1, which will be relied on as altering the law, it was only intended to sweep away all discriminations and preferences which once existed between the Church of England and other branches of the Christian Church, not to legalize general attacks upon the whole Christian religion by persons (such as the lecturer in the present case) professing no religion at all.

This is the construction placed by Chancellor Kent, in *The People v. Ruggles*, 8 Johns 291, upon Article 38 of the Constitution of New York State, which contains language identical with the clause referred to in our statute.

Bethune, Q. C., contra. This is the first occasion on which the point under discussion has come before a Court in Ontario for determination, although it is somewhat discussed in *Boucher v. Shewan*, 14 C. P. 419 ; but it was unnecessary in that case to decide it, and in fact the Court did not assume to determine it.

In England, there is no doubt, following the case of *Cowan v. Milbourn*, already referred to, the Court would be obliged to hold that these lectures were illegal. It is submitted, however, that the true ground upon which Christianity is said to be part of the law of England, as applied to England, is because the English Church is a part of the Constitution, and a portion of the state machinery, just as much as the Court of Queen's Bench. Various statutes from time to time have been passed in England which establish the authority of the Scripture and Prayer Book, and these statutes are based on the idea that the Scriptures and Prayer Book are the foundation of the State Church.

In the *Queen v. Gathercole*, 2 Lewin C. C. 237, 254, Baron Alderson stated that it was not indictable as blasphemy to libel the Roman Catholic religion, or any branch of the Protestant dissenting faith, but only to libel the doctrines of the Established Church, because that Church is part of the constitution and laws of the kingdom.

In this country we have no Established Church, and since the passing of the Statute chapter 74 of the Consolidated Statutes of Canada, we have not had in the Provinces of Ontario or Quebec even the semblance of any connection between Church and State.

That statute declares that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, is by the constitution and laws allowed to all Her Majesty's subjects ; and the only qualification of this broad declaration consists in the words of the proviso, "so as the same be not made an excuse for acts of licentiousness or a justification of practices inconsistent with the peace and safety of the Province."

Now, provided the practices enjoined by any system of religious profession are not considered licentious or dangerous to the peace of the Province, that system of religion is tolerated, and is therefore legal.

The term "religious profession" should not be confined to the various forms of the Christian religion, but should extend to the religion of the Jews or that of the Mahomedans or the Buddhists, or in fact any species of faith and worship. It is clear that the Legislature did not intend to confine the term "religious profession" to the profession of Christianity, otherwise it would have used the term "Christianity" instead of the term "religion."

It is true that this section of the statute was borrowed from an Act of the Legislature of New York, passed in 1771, and that Chief Justice Kent, in the *People v. Ruggles*, 2 Johnson, p. 299, interpreted it differently from the way in which it is submitted it should be interpreted; but that decision, though of a very eminent Judge, is not binding upon the Courts of this Province, and ought not, it is submitted, to be followed, having regard to the wider scope allowed in the discussion of religious belief than existed at the time when that case was decided.

There is no doubt that a very great advance has been made in the interpretation of the Scriptures, and that many things are now freely avowed by persons whom nobody would accuse of heresy, but which would have caused, a hundred or even fifty years ago, the expulsion from any Christian body, of the person openly giving expression to them. Indeed, it is likely that the doctrines laid down by Chief Justice Kent would not now be propounded in the State of New York. Many of the dicta in his judgment were unnecessary for the decision of the particular case, because there can be no doubt that Ruggles wickedly and maliciously did that of which he was accused. Here, the Judge who tried the case has found that Mr. Pringle was not actuated by any wicked motive, but *bonâ fide*, for the public good, procured the delivery of the lectures in question. The case of *Rex v. Waddington*, 1 B. & C. 26,

shews that a publication must be malicious before it can be said to be indictable as blasphemy.

No case, as far as can be found, is to be met with in the books in Ontario of an indictment for blasphemy; and it would doubtless astonish every person to be told that Professor Huxley, or Mr. Darwin, or Mr. Tyndall, or Mr. Frederick Harrison, would be liable to indictment for blasphemy because of the publication of their various books and pamphlets, all of which, quite as much as Mr. Underwood's lectures, impugned the authority of the Scriptures and the Divinity of our Saviour.

The decisions in the Courts of the United States should not be followed, because various Statutes were from time to time passed, which recognised the Christian religion as a part of the laws of the various States.

It is clear that Christianity does not need for its support the statute law of any country; indeed, the Divine Founder of Christianity did not rely upon earthly authority for the propagation of his system of religion; on the contrary, He expressly disclaimed any earthly authority, and declared that "His kingdom was not of this world."

If Christianity be true, as we believe it is, then its truth will become more manifest in consequence of such discussions as those of Mr. Underwood; and if it be untrue, it is of the highest importance that its want of truth should be demonstrated; so that, as a matter of policy, the Court is not called upon to place the restricted construction upon the statute referred to, but should give it as wide a construction as possible.

If the Legislature intended to allow such freedom of religious profession as it is contended they did, then it is perfectly clear that that freedom of religious profession must carry with it the right to discuss the religious tenets of the Christian religion; and to propagate its own tenets, it must carry with it the right to deny the authority of the Christian religion, otherwise it could not be said that there was free exercise and enjoyment of religious profession; and this is all that Underwood proposed to do, and did, in the lectures which Pringle procured him to deliver.

It is therefore submitted that the rule should be made absolute to enter a verdict for the plaintiff for the amount referred to in the notes of the learned Judge.

June 29, 1878. HARRISON, C. J.—A question similar to the one before us in this case was argued, but not decided, in *Boucher v. Shewan*, 14 C. P. 419.

The broad question is, whether Christianity is so far a part of the law of the land that an attack upon it, or upon some of its fundamental doctrines, is illegal.

It is a question affecting property and civil rights in the Province.

The 32 Geo. III. ch. 1, passed on 15th of October, 1792, provided that, from and after the passing of the Act, in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as the rule for the decision of the same.

This statute has since been re-enacted in Consol. Stat. U. C. ch. 9, sec. 1, and Revised Statutes Ont. ch. 92, sec. 1.

The Legislature of Upper Canada, by 40 Geo. III. Cap. 1, sec. 1, introduced the Criminal Law of England as it stood on 17th September, 1792.

The enquiry therefore is, what was the law of England in 1792, touching the matters in controversy here.

An examination of the English law will be found to establish that Christianity in general, and not simply the tenets of particular sects, is a part of the Common Law of England, and that the cardinal doctrines of Christianity have been from time to time respected and guarded by the Legislature and common law of the country.

The English Legislature, as early as 1676, passed the 29 Car. II. ch. 7, intituled "An Act for the better observation of the Lord's Day, commonly called Sunday." Sunday, as a day of religious observance, had its birth not only as a general recognition of Christianity but as a particular memorial of the resurrection of the Lord Jesus Christ on that day. Its observance, is compelled not only by legislation in the mother country but in most of the colonies.

Besides, in 1698, the English Legislature passed the 9 & 10 Will. III. ch. 32, intituled "An Act for the more effectual suppression of blasphemy and profaneness," reciting that "many persons have of late years openly avowed and published many blasphemous and impious opinions contrary to the doctrines and principles of the Christian Religion, greatly tending to the dishonour of Almighty God, and may prove destructive to the peace and welfare of this kingdom;" and for remedy enacted "that if any person or persons, having been educated in, or at any time having made profession of the Christian Religion, shall by writing printing, teaching, or advized speaking, deny any one of the persons of the Holy Trinity to be God, or assert or maintain that there are more Gods than one, or deny the Christian Religion to be true, or the Holy Scriptures of the Old and New Testaments to be of divine authority," and shall be thereof convicted by the oath of two or more credible witnesses, "such person or persons for the first offence shall be adjudged incapable and disabled in law, to all intents and purposes whatsoever, to have or enjoy any office or offices," &c. And if a second time convicted, shall thenceforth "be disabled to sue, prosecute, plead, or use any action, &c., and shall also suffer imprisonment for the space of three years without bail or mainprize," &c.

This Act, with all its penalties, was in force in the Mother Country till 21st July, 1813, when the 53 Geo. III. ch. 160 sec. 2 was passed, repealing its provisions, "so far as the same relate to persons denying as therein mentioned respecting the Holy Trinity."

But as the Act was held to be merely an affirmation of the common law of England, the effect of its partial repeal has been held to be merely a repeal of its penalties: *Reax v. Waddington*, 1 B. & C. 26.

It would appear to be in force in this colony, with all the penalties, notwithstanding the repeal of the penalties in England.

Let us now turn to the common law of England as contained in the decisions of the Courts.

Chief Justice Hale, in *Tayler's Case*, 3 Keb. 607, where the information was for saying "Christ is a whoremaster and religion is a cheat," said, "These words, though of ecclesiastical cognizance, yet to say that religion is a cheat tends to dissolution of all Government, and therefore punishable here, and so of contumelious reproaches of God or the religion established." He also said, "Christian religion is a part of the law itself; therefore injuries to God are as punishable as to the King or any common person." According to the report in 1 Ventris 293, the learned Chief Justice said, "That such kind of blasphemous words were not only an offence to God and religion, but a crime against the laws, State, and Government, and therefore punishable in this Court; for to say religion is a cheat, is to dissolve all those obligations whereby civil societies are preserved, and that Christianity is a parcel of the laws of England, and therefore to reproach the Christian religion, is to speak in subversion of the law."

The sentence of the Court upon the offender was, "to stand in the Pillory in three several places, and to pay 1000 marks fine, and find sureties for his good behaviour during life."

In *Rex v. Woolston*, Fitz. 64, S. C. 2 Stra. 834, the information was against defendant for publishing discourses on the miracles of Christ, in which the accused maintained that the same are not to be taken in a literal sense, but that the whole relation of the life and miracles of Christ in the New Testament is but an allegory. It was charged that the defendant published his discourses with an intent to vilify and subvert the Christian religion. Defendant was found guilty, and on motion for arrest of judgment, Raymond, C. J., said, "Christianity *in general* is a part of the Common Law of England, and therefore to be protected by it. Now, whatever strikes at the very root of Christianity, tends manifestly to a dissolution of the civil government, and so was the opinion of my Lord Hale in *Tayler's Case*. So that to say an attempt to subvert the

Christian religion is not punishable by those laws upon which it is established, is an absurdity. If this were an entirely new case I should not think it a proper question to be made. I would have it taken notice of that we do not meddle with *any differences in opinion*, and that we interfere only where the very root of Christianity is struck at, as it plainly is by this allegorical scheme."

In the case of *Jacob Ilive*, H. T., 29 Geo. II., mentioned in *Folkard on Slander*, 4th ed. 596, an information was exhibited and filed against defendant for publishing a profane and blasphemous libel tending to vilify and subvert the Christian religion, and to blaspheme Jesus Christ, to cause his divinity to be denied, and to represent him as an impostor, &c.

In the case of *Peter Annett*, M. T. 3 Geo. III. Folkard 596, an information was exhibited against defendant for a libel in the "*Free Inquirer*," tending to blaspheme Almighty God and discrediting the Holy Scriptures, and upon conviction defendant was sentenced, at the Court of King's Bench, to stand twice in the pillory (once at Charing Cross and once at the Royal Exchange), and to be imprisoned for one year, and to find security for his good behaviour during the remainder of his life.

In the case of *John Wilkes*, H. T. 4 Geo. III., Folkard 597, an information was exhibited against defendant for blaspheming Almighty God, ridiculing our Saviour and the Christian religion.

In *Rex v. Williams*, before Kenyon, C. J., in 1797, Folkard, 597, the defendant was convicted of having published "*Paine's Age of Reason*," which denies the authority of the Old and New Testaments.

In *Rex v. Eaton*, before Sir Vicary Gibbs, E.T. 52 Geo. III., Folkard, 597, defendant was convicted upon an information of having published a libel representing Jesus Christ as an impostor, the Christian religion as a fable, and those who believed in it as infidels to God.

In *Rex v. Hetherington*, 5 Jur. 529, Q. B., it was held to be an indictable offence at common law to publish a blasphemous libel of and concerning the Old Testament.

These cases establish that Christianity is in a broad sense a part of the common law of England, and that to libel it by attacking any of its cardinal principles is an indictable offence.

This doctrine was recognized by Lord Hardwicke, in *DeCosta v. DePaz*, 2 Swans. 490; by Lord Ellenborough in *Rex v. Eaton*, 31 St. Tr. 950; and by Lord Eldon in *Re Bedford Charity*, 2 Swans. 527. See also *Attorney-General v. Pearson*, 3 Mer. 399. The latter learned and distinguished Judge refused to protect copyrights in books which contradicted the Holy Scriptures: *Lawrence v. Smith*, 1 Jac. 474; *Southey v. Sherwood*, 2 Mer. 435; *Murray v. Benbow*, 1 Jac. 474, Note.

Taylor's Case and *Woolston's Case* were, in *Rex v. Carlile*, 3 B. & Al. 161, decided in 1819, recognized as being sound expositions of the common law of England, and it was there held that the Statute 9 & 10 Wm. III. ch. 32, had not altered the common law, but only given a cumulative punishment. Best, J., speaking of the statute, said at p. 167, "The Act is not confined to those who libel religion, but extends to those who, in the most private intercourse, by advised conversation admit that they disbelieve the Scriptures." He also said, "Both the common law and the statute are necessary; the first, to guard the morals of the people, the second, for the immediate protection of the government."

In the *King v. Waddington*, 1 B. & C. 26, already mentioned, it was intimated that the English Statute 53 Geo. III. cap. 160, does not, any more than the English Statute 9 & 10 Wm. III. cap. 32, alter the common law of the land. The information there was against defendant for stating that Jesus Christ was an impostor and a murderer in principle, and a fanatic. Best, J., at p. 28, said: "It is not necessary for me to say whether it be libellous to argue from the Scriptures against the Divinity of Christ. That is not what the defendant proposes to do. He argues against the Divinity of Christ by denying the truth of the Scriptures."

In *Rex v. Gathercole*, 2 Lew. C. C. 254, Alderson B., in his

charge to the jury, said: "A person may, without being liable to prosecution for it, attack Judaism or Mohammedanism, or even any sect of the Christian religion (save the Established religion of the country,) and the only reason why the latter is in a different situation from the others is, because it is the form established by law and is therefore a part of the constitution of the country. In like manner and for the same reason any general attack on Christianity is the subject of criminal prosecution, because Christianity is the established religion of the country."

A review of the foregoing cases justifies the remark of Kelly, C. B., in *Cowan v. Milbourn*, L. R. 2 Ex. 234, where he said, "There is abundant authority for saying that Christianity is a part and parcel of the law of the land."

That case, in its facts, closely resembles the one now before us. The defendant contracted to let rooms to the plaintiff. Defendant afterwards discovered that they were intended to be used for the delivery of lectures maintaining that the character of Christ is defective, and his teaching misleading, and that the Bible is no more inspired than any other book. Having made this discovery the defendant refused to allow plaintiff the use of the room, and it was held that the purpose for which the room was hired was illegal, and the contract one which could not be enforced at law. Martin, B., said, "It is merely the case of the owner of property exercising his rights over its use." All the Judges held that the purpose was illegal, and that, the purpose being illegal, the contract was illegal and could not be enforced.

This case correctly expresses the Common Law of England. If the case now before us were in England it could only result as that case did.

The doctrines of Christianity are deducible from the Holy Scriptures, and are illustrated by the life, conduct, and teachings of our Lord Jesus Christ and his Apostles. An attack upon the life or teaching of Christ is therefore an attack upon the Christian religion. An attack upon

the Holy Scriptures, in which the life and death of Christ are foretold and made manifest for our instruction and guidance, is also an attack upon the Christian religion. The Christian religion itself was, we think, in 1792 a part of the Common Law of England, and as such, in effect, became a part of the Common Law of this Province under the operation of the Act of 1792.

In *Story* on the Constitution of the United States, sec. 1873, it is said: "Every American colony from its foundation down to the revolution, with the exception of Rhode Island, (if indeed that State be an exception,) did openly, by the whole course of its laws and institutions, support and sustain in some form the Christian religion, and almost invariably give a peculiar sanction to some of its fundamental doctrines."

This in the several States is held to be the law, notwithstanding the amendment to the constitution to the effect, "That Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press." (Sec. 1870.)

The purpose of such a declaration is well explained by the same learned writer in sec. 1877, where he says: "The real object of the amendment was not to countenance, much less to advance, Mahommedanism, or Judaism, or Infidelity, by prostrating Christianity, but to exclude all rivalry among *Christian* sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the National Government."

In the *People v. Ruggles*, 8 Johns, N. Y. 290, decided in 1811, the defendant was indicted and convicted of having said, "Jesus Christ was a bastard, and his mother must be a whore," and the indictment was held to disclose a good common law offence.

The eminent jurist, Chief Justice Kent, in delivering judgment said, at p. 294, "The people of this State, in common with the people of this country, profess the general doctrines of Christianity as the rule of faith and practice, and to scandalize the Author of these doctrines, is not only

in a religious point of view extremely impious, but, even in respect of the obligations due to society, is a gross violation of decency and good order." In a subsequent part of the same judgment, at p. 296, he said, "Though the constitution has discarded religious establishments, it does not forbid judicial cognizance of those offences against religion and morality which have no reference to any such establishment, or to any particular form of government, because they strike at the root of moral obligation, and weaken the securities of the social ties."

The constitution to which reference was here made, was that of the State of New York, wherein, by art. 7 sec. 3, it is provided that, "The free exercise and enjoyment of religious profession and worship, without discrimination or prejudice, shall forever hereafter be allowed within the State to all mankind."

The only limitation is, that the liberty of conscience thus secured, "shall not be so construed so as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State."

The principal decision, in which it was held that Christianity is a part of the Common Law of the State of Pennsylvania, is *Updegraph v. The Commonwealth*, 11 Serj. & R. 394. The defendant was in that case indicted for having said, "That the Holy Scriptures were a mere fable; that they were a contradiction, and that although they contained a number of good things, yet they contained a great many lies." Duncan, J., at p. 400, said, "Christianity, general Christianity, is and always has been a part of the law of Pennsylvania." "By general Christianity," he said, at p. 408, "is not intended the doctrine or worship of any particular worship or sect;" and at p. 407 he said, "It is impossible to administer the laws without taking the religion which the defendant in error has scoffed at, that Scripture which he has reviled, as their basis; to lay aside these is at least to weaken the confidence in human veracity, so essential to the purposes of society, and without which no question of property could be decided, and no criminal brought

to justice ; an oath in the common form, on a discredited book , would be a most idle ceremony."

The plaintiff in error was shewn to be a member of a debating association which was convened weekly for discussion and mutual information. The expressions contained in the indictment were uttered in the course of argument on a religious question ; and, notwithstanding, he was convicted and the conviction upheld.

The general doctrines enunciated in *Updegraph v. The Commonwealth*, received the approval of the Supreme Court of the United States, in *Vidal v. Girard's Executors*, 2 How. U. S. 198, in which it was said that Chistianity may be taught, and properly taught, without the aid of ecclesiastics of any particular creed or sect.

The argument was, that because the testator, in making the magnificent donation for the well known College for Orphans in Philadelphia, which bears his name, coupled it with the proviso, " that no ecclesiastic, missionary or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the College," and that no such person shall " ever be admitted for any purpose, or as a visitor within the premises appropriated to the purposes of the said College," the devise was hostile to Christianity, and so void; but the Court held that the reasons assigned by the testator for the exclusion were good, and did not militate against the Christian religion.

The testator's reasons were as follow : " In making this restriction I do not mean to cast any reflection upon any sect or person whatsoever ; but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce."

The constitution of Pennsylvania, as passed in 1790, in substance re-enacted in 1796 and afterwards in 1830, declares " That all men have a natural and indefeasible right to worship Almighty God according to the dictates

of their own consciences : no man can of right be compelled to erect, attend, or support any place of worship, or to maintain any ministry against his consent ; no human authority can in any case whatever control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship."

By the constitutions of the States of New Hampshire, Vermont, and Maine, the open denial of the being and existence of a God is prohibited by statute and declared blasphemy.

In Massachusetts it is provided by statute of 1782, Rev. Stat. ch. 130, sec. 15, "that if any person shall wilfully blaspheme the holy name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world, he shall, &c."

Under this statute a person was tried and convicted for having published the following :

1. Universalists believe in a God, which I do not, but believe that their God, with all his moral attributes (aside from nature itself), is nothing more than a mere chimæra of their own imagination.

2. Universalists believe in Christ, which I do not, but believe that the whole story concerning him is as much a fable and a fiction as that of the god Prometheus, the tragedy of whose death is said to have been acted on the stage at Athens five hundred years before the Christian Era.

3. Universalists believe in miracles, which I do not, but believe that every pretention to them can be accounted for on natural principles, or else is to be attributed to mere trick and imposture.

4. Universalists believe in the resurrection from the dead, in immortality and eternal life, which I do not, but believe that all life is mortal, and death is an eternal extinction of life to the individual who possesses it, and that no individual life is, ever was, or ever will be, eternal. See *Commonwealth v. Kneelan*, 20 Pick. 206, decided in 1858.

In *Shover v. The State*, 5 Eng. 259, decided in 1850, it

was said that the Christian religion is recognized in Arkansas as constitutionally a part of the common law, its institutions are entitled to profound respect, and may well be protected by the law.

Much reliance was placed by counsel for the plaintiff, in the case before us, on Consol. Stat. Can. cap. 74, as indicating, on the part of the Legislature, an intention that the Christian religion should not be held, any more than any other religion, a part of the laws of this Province.

It recites as follows: "Whereas the recognition of legal equality among all religious denominations is an admitted principle of Colonial Legislation; and whereas, in the state and condition of this Province, to which such a principle is peculiarly applicable, it is desirable that the same should receive the sanction of direct legislative authority, authorizing and declaring the same as a fundamental principle of our civil policy;" and in section 1 enacts, "The free exercise of religious profession and worship, without discrimination or preference, so as the same be not made an excuse for licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is, by the constitution and laws of this Province, allowed to all Her Majesty's subjects within the same."

There is nothing in the language of this Act to indicate an intention on the part of the Legislature to dethrone Christianity as a part of the Common Law of the country. The language used closely resembles that of the amendment to the Constitution of the United States, and the clause in the Constitution of the State of New York already quoted, and ought not to receive any wider interpretation than the Constitutions of the United States and of the State of New York received from the Courts. The Act is designed to deal rather with different sects of the recognized religion of the country, than with all manner of religions, by different people, in different parts of the known world. The Act is intituled "An Act respecting the Rectories." Its original purpose was in part to put an end to the ascendancy which one body of Christians had apparently obtained

in the early history of the Province, and its continued purpose is for all time to come to prevent any such ascendancy on the part of that or any other denomination of Christians.

The status of each Christian denomination in the Colonies will be found discussed in *Long v. The Bishop of Capetown*, 1 Moore, P.C.C. N. S. 411; *Murray v. Burgeis*, 4 Moore, P.C.C., N.S., 250; *In re Bishop of Natal*, 3 Moore, P.C.C., N.S., 115; *Bishop of Natal v. Gladstone*, L. R. 3 Eq. 1; *Bishop of Capetown v. Natal*, 6 Moore, P.C.C. N.S., 203; and *Dunnett v. Forneri*, 25 Grant 199.

The Legislature of the late Province of Canada, by Consol. Stat. U. C., cap. 104, not only recognized the Christian religion as a part of the law of the Province, but, like the English Legislature, so far recognized it as to pass "An Act to prevent the Profanation of the Lord's Day." This Act is now to be found in chapter 184 of the Revised Statutes of this Province.

A Legislature which makes the profanation of the Lord's Day an offence, is not a Legislature which can be assumed to have subverted the law by making Christianity no longer a part of the law of the land. If Consol. Stat. Can. cap. 74, were to be looked upon as a part of the Constitution of the Dominion, and as contained in B.N.A. Act, such an Act as Consol. Stat. Can., cap. 104, would be held constitutional. *Shover v. The State*, 5 Eng. 259.

The Empire to which we belong owes much of its greatness and influence among the nations of the earth to the profession, practice, and propagation of the religion of Jesus Christ. The many colonies of the Empire are growing into importance and power by reason of the love which they bear for Christ, and the high morality which He taught, and the blameless life which He led. It will require something more than mere general words in an Act of Parliament to compel a Court of Justice in any portion of the Empire to hold that the glory of the Empire is to be tarnished by the removal from its exalted position of Christianity as an integral part of the common law of the country.

We admit that more latitude is allowed to religious discussions in the present day, than was allowed when some of the cases to which we have referred were decided. There is no question of more awful import than the relation of man to his Creator. Men may differ, and will differ, and honestly differ in their views about this relation. Each man must, as to such a matter, in his own conscience, form his own opinion, at his own risk, both here and hereafter. It is not likely that any man in the present day will be convicted, or if convicted punished for the honest and temperate expression of his opinion.

Lord Mansfield, as long ago as *Naylor's Case*, 5 Howell St. Tr. 825, said, "There is certainly nothing more unreasonable, more inconsistent with the rights of human nature, more contrary to the precepts and spirit of the Christian religion, more iniquitous and unjust, more impolitic, than persecution. It is against natural religion, revealed religion and sound policy."

It is true that sects of Christians have too often, in their blind fury and deep rooted prejudices, when defending their creeds against those who differed from them, not only disregarded the wisdom unfolded by the eloquent words of Lord Mansfield, but so acted as to bring disgrace on the very name of the Christian religion. There is no fear, however, of the people at large, in any portion of the British Empire, in these days of enlightenment and religious toleration, ever so far forgetting what is due to themselves, to their country and to their God, as to punish men for the honest and temperate exercise of liberty of conscience where the interests of the State are not imperilled.

The question as to what is or is not a libel, on a prosecution for libel, is a question for a jury.

The good sense of jurors will prevent anything like oppression for the temperate and honest expression of religious belief, however erroneous. The greatest latitude is permitted both in the Mother Country and here to discussions about religion in every form. Men holding high office even, in what is called the Established Church in

England, are now permitted with impunity to question fundamental doctrines of the Christian religion. Men outside of the Church, and holding no office in any church, are allowed the utmost freedom in the discussion of their peculiar views about religion. Church dignitaries, instead of attempting to have such men burned or otherwise punished for their utterances, now content themselves with answering what they conceive to be their errors. Those discussions which lead to the overturning of the Christian religion are, strictly speaking, illegal, but it is felt that it is better not to make martyrs of men who, however ignorant or misguided they may be, are honestly in search of truth. If the Christian religion is grounded on truth, as we believe it is, it has nothing to fear from such discussions. No one is attempting to punish Mr. Underwood for the expression of his opinions about the supposed fallacies of the Bible and Christianity. The guardians of the town hall, in Napanee, simply refused, when they learned of his peculiar views, to permit him to express them in that hall. This was not more than the exercise of the legal right which they possess of refusing to allow their property to be used for what the law holds to be an illegal purpose.

As said by Bramwell, B., in *Cowan v. Milbourn*, L. R. 2 Ex. 236, "A thing may be unlawful in the sense that the law will not aid it, and yet the law will not immediately punish it."

The purpose being illegal, the contract is illegal. The illegal purpose was not known to the defendants when they made the contract with the plaintiff. The law, upon the discovery of the purpose, gives defendants the right to repudiate the contract. Their plea, therefore, is a good one, and is sustained by the evidence.

See further, 1 *Russell* on Crimes, 9th Am. Ed. from 4th Lond. Ed. 332; *Stephen's* Digest of Criminal Law 108; 1 *Bishop's* Criminal Law, 496; *Cooley's* Constitutional Limitations, 2nd ed., 472.

ARMOUR, J., concurred.

Rule discharged.

RE MOYLE AND THE CITY OF KINGSTON.

Award—Rev. Stat. O. ch. 174, sec. 456—Delay in moving against.

Held, that an application to set aside an award made under sec. 456, R. S. O., ch. 174 and published before Trinity Term, 1877, was too late on the 26th Nov. following, though the full Court did not sit in Trinity Term. Such an award having been set aside by a single Judge, on motion made after Trinity Term, the Court gave effect to this objection though first taken on appeal from the rule setting aside the award.

This was an application, by way of re-hearing, made in Hilary Term last by *J. Maclellann*, Q. C., on behalf of the city of Kingston, of a rule, made by *Armour, J.*, setting aside an award made herein under the following circumstances:—The Council of the city of Kingston had been preparing for some time before the passing of the by-law herein mentioned, for the opening of a street continuing Montreal street from Princess street, in a direct line, to Burk street, and at length on the 10th of October, 1876, the council gave notice of their intention to pass a by-law for the opening of that street, and of several other streets, and a by-law was accordingly passed for that purpose on the 20th of November of that year. Arbitrators were duly appointed to determine the value to be paid to Mrs. Moyle for the land which would be taken from her by the continuation of Montreal street, and on the 11th of July, 1877, two of the three arbitrators concurred in an award by which \$650 was awarded to Mrs. Moyle for the compensation to be paid to her for the land so taken from her. On the 26th of November, 1877, a rule was granted, on behalf of Mrs. Moyle, by *Gwynne, J.*, calling on the city of Kingston to shew cause why the award should not be set aside and the matter remitted to the arbitrators for further consideration, or why the award should not be modified by the Court, by increasing the amount awarded to the complainant for compensation, and why the city should not be ordered to pay the costs of the arbitration, on the following grounds:—

1. That the sum awarded to the claimant for compensa-

tion for the damages to her from the entering upon and taking her land by the said corporation for the extension of Montreal street, in said city, was not sufficient according to the evidence.

2. That as the claimant did not, nor did she at the time of the passing of the by-law to open said street, own any land adjoining the line of said street, there were no advantages which could accrue to the complainant from the opening of said street, for or in respect of which any deductions could or should legally have been made.

3. That the arbitrators should not have considered in any way, as affecting the compensation to be awarded to the claimant, the sale by the claimant to one James McCammon of the piece of land in the evidence mentioned.

4. That the arbitrators should not have considered in any way, as affecting the compensation to be awarded to the claimant, the amount paid by James, McCammon to one William Martin for a surrender of a lease which included, with other lands, the land settled upon and taken by the corporation, and in respect of the value of which the arbitrators were to arbitrate.

5. That even if any deduction should have been made in this case for advantages accruing to the claimant from the opening of the said street, the arbitrators should have taken into consideration, in reduction of such advantages, the fact that one half the cost of opening, grading, and making the street and approaches thereto, had to be borne by the owners of land to be directly benefited by such improvement, in pursuance of the terms of the by-law passed by the council to open the street in question.

6. That the arbitrators should have awarded and directed that the city should pay to the claimant her costs of the arbitration, and also all the costs and fees of the arbitration.

The rule was argued before Armour, J., and on the 21st of December, 1877, a rule was made directing that the said award be set aside, and that the subject matter of the reference to arbitration be remitted to the arbitrators appointed therein; and they were directed to award to the

claimant the actual cash value of her land, twenty-five feet eight inches, in front, and one hundred and thirty-two feet deep, irrespective of any consideration of the lease to one William Martin, or other sale made to James McCammon, and just as if she had never owned any other land but that taken by the corporation for the street; and that such award be so made by the said arbitrators and be returned, together with any further evidence that they might take in the matter, if they should see fit to take any such, to this Court., on or before the first day of Hilary Term then next. And it was further ordered, that such papers and documents as might be required by the arbitrators on such reference might be sent to them; and the further consideration of the said matter, and of the costs of the said order, were reserved until after the award should be made.

The following were the grounds of rehearing :—

1. Because the application was too late, the award having been made and published to the parties before the first day of August last, and no motion made against it until Michaelmas Term.

2. Because a single Judge had no jurisdiction to set aside the award.

3. Because the award, being good on its face, and having been made *bonâ fide* and without any misconduct, could not be set aside.

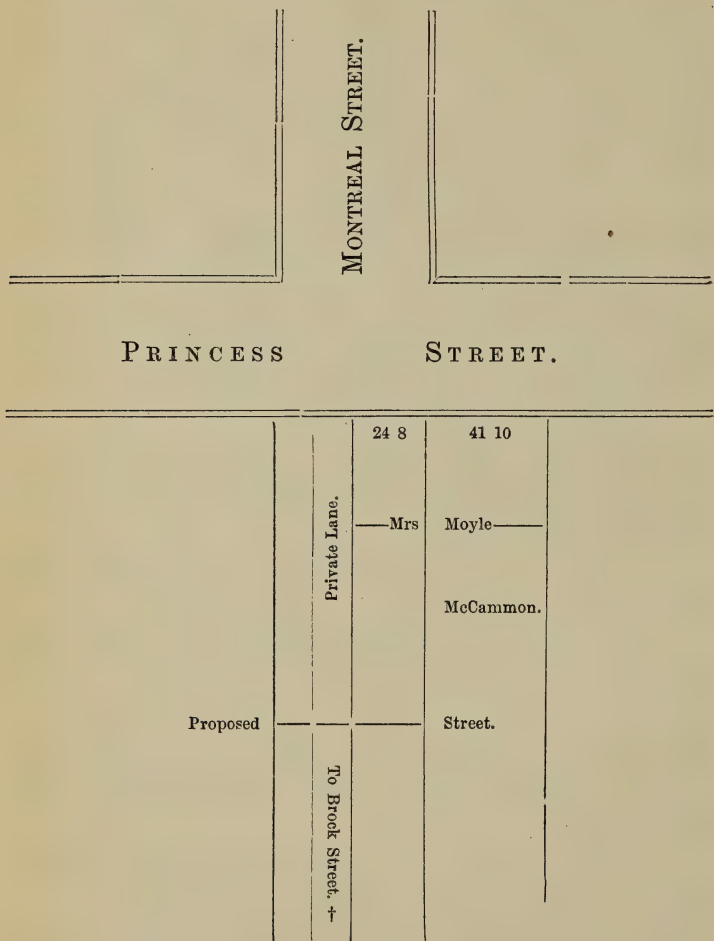
4. There was no evidence, or no admissible evidence, of the grounds or principle on which the arbitrators proceeded, nor that they proceeded on any erroneous grounds or principle.

5. If the arbitrators considered the advantages received by the plaintiff from the opening of the street, they had a right to do so, and they had a right to consider everything that took place after the inception of the proceedings for expropriation, and not merely at the time of making their award.

6. To hold otherwise would enable parties in all cases to evade the provisions of the statute and get the benefit of the public improvements without the deductions which the statute contemplated.

7. Because the award was just and fair, and ought not to be disturbed.

The following is a sketch of the property sufficient for the purpose of understanding the contention:—



MacLennan, Q. C., in support of the re-hearing.

The motion in November, 1877, to set aside the award made in July previous, and published before Trinity Term in August thereafter, was too late. The motion should have been made in Trinity Term.

The *full* Court did not sit in that Term, but that did not do away with the Term, and although the full Court did not then sit, the single Judge, under the statute, was then sitting for the full Court, and the application might as well have been made before him then, as it was, in Michaelmas Term last, before a single Judge, who was sitting for the full Court; and even if the Common Law Courts were not sitting in that Term, the party might have applied to the Court of Equity, which then sat, and is always sitting: *Taylor v. Bostwick*, 1 Ch. Chamb. 53. An affidavit produced shews the publication of the award was made before the beginning of Trinity Term.

(*George Kirkpatrick*, contra, objected to it, as it had been made and filed since the disposal of the case by the single Judge.)

The Court may receive the affidavit now, although it was not used before; but, apart from the affidavit, it may be presumed the award was published at the time it was made, and that shews it to have been published nearly six weeks before the beginning of Trinity Term: *Russell* on Arbitrators, 4th ed., 635, *et. seq.* As to the valuation of the property. Revis. Stats., O., ch. 174, sec. 456, provides that the arbitrators shall consider "any advantage which the claimant may derive from the contemplated work." But the claimant says she derives no advantage from the work. That, however, is not true. She owned the whole lot, and she bargained with Dr. McCammon to sell it to him. He says he was to have had the whole lot, if no street were carried through the property, for the price which is expressed in the conveyance to him of the residue of the lot, deducting the portion which it was supposed was required for the street; and the price which was paid by him for the residue of 41 feet 10 inches, was really the value of the whole lot 66 feet 6 inches, because the price he gave is the value of the part he has with the street, that is, with the whole front of his lot upon the new street, and such price would not have been more than the value of the entire lot without the new street. The claimant, after getting the

value of the part she conveyed to Dr. McCammon, as if the street had then been opened, because it was quite determined then that the street was to be opened through, reserves the parcel, which Dr. McCammon disputed her right to do, which will be wanted for the street, for the purpose of getting the full value of it from the city, just as if she had never had any other property to be benefited by that street; and then she says no deduction for compensatory advantages can be made against her, because she has no land left to be benefited, the city taking the whole of her land from her. Of course that is a mere evasion, and under the circumstances the arbitrators were quite right in valuing her whole lot and deducting from that value the price she had got from Dr. McCammon, and giving her the balance.

The lot was valued at	\$5,000
Dr. McCammon gave.....	4,100

Leaving..... \$900

Dr. McCammon had to pay to a tenant of the place, whose term had about eighteen months to run, \$250, and the arbitrators, after deducting that sum, gave to the claimant \$650, and she claims about \$2,000 more than has been awarded.

Kirkpatrick, contra.

Michaelmas Term, when the motion to set aside the award was made, was the first Term in which the Court sat after the making of the award.

Trinity Term, by the rule of the Court declaring that the Court would not then sit, was for the occasion, as if the Term had been abolished.

It was on the party taking the objection to shew that the award was published before Trinity Term. No such objection was taken at any time before the rule absolute was made setting aside the award. The objection comes now too late upon appeal, and especially as the Court can under circumstances give a longer time than the statute or the course of practice allows in cases which are

not governed only by the statute: *Russell* on Arbitrators, 3rd ed. 652; *Rogers v. Dallimore*, 6 Taunt. 111. The full value of the property should have been allowed to the claimant which was taken from her, because it was all she had. The \$250 paid to the tenant should not have been deducted from her: *Stretton v. Great Western and Brantford R. W. Co.*, L. R. 5 Ch. App. 751; and interest should have been allowed: 47 Calif. 515; *Rhys v. Dare Valley R. W. Co.*, L. R. 19 Eq. 93.

29th June, 1878. HARRISON, C. J.—I am of opinion that the application to set aside the award was too late.

The award moved against was made before 1st August, 1877.

The award was made under and pursuant to section 373 of 36 Vic. ch. 48, Ont., which is the same as section 456 of the present Municipal Institutions Act, Revised Statutes Ont., ch. 174, sec. 456.

It was declared by sec. 295 of 36 Vic. cap. 48, and is now declared by sec. 385 of the Revised Statutes Ont., that every award made under the Act shall be subject to the jurisdiction of any of the Superior Courts of Law or Equity, "as if made on a submission by a bond containing an agreement for making the submission a rule or order of such Court."

The effect is to bring all such awards under the operation of the English Statute 9 and 10 Wm. III., cap. 15, sec. 2, which provides that any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of Law or Equity, "so as complaint of such corruption or undue practice has been made before the last day of the Term next after such arbitration or umpirage made or published to the parties."

If there be no cause pending in Court, the rule is, that an application to set aside an award coming under the operation of the statute, cannot be entertained unless made within the Term next after the making and publication of the award: *In re Cumming and Graham*, 1 Pr. 122; *In*

re North British Railway Co. and Trowsdale et al., L. R. 1 C. P. 40.

If the application be made to a Court of Equity, that Court, although having no Terms such as existing in Courts of Common Law, will in the measurment of time act by analogy to Common Law Terms, and only entertain the application when made within the time which corresponds with the Common Law Term : *In re Taylor and Bostwick*, 1 Ch. Cham. 53; *Harvey v. Shelton*, 7 Beav. 464; *In re Harper and Great Eastern R. W. Co.*, L. R. 10 Eq. 39, 45.

Where there is the power to make the application, the duty to make it within the time limited by the statute for the purpose, in the case of such an award as the present, appears to be imperative. See *In re Governors of the College of Christ, Brecknock and Martin*, L. R. 3 Q. B. Div. 16.

Trinity Term, 1877, according to the statute, began on Monday the 27th of August, and expired on Saturday the 8th of September, the award moved against was made on the 11th of July, 1877, and was published to the parties long before the 27th of August; and yet the application to set it aside was not made till the 26th of November following.

The date of the publication of the award appears for the first time in the affidavit filed on rehearing. This affidavit is not controverted; but it is argued that effect should not be given to what it contains, because it was not filed before the rehearing.

The only power which the Court has to set aside this award is, under the statute 9 & 10 Wm. III. c. 15; and that statute only permits the exercise of the power when invoked within the time limited by the statute. Consent will not give jurisdiction where, owing to effluxion of time, the Court has no jurisdiction except under the statute: *In re North British R. W. Co. and Trowsdale*, L. R. 1 C. P. 401.

It clearly appearing, from the affidavit filed on the rehearing, that the publication was before Trinity Term, and

that affidavit being in no manner controverted as to the facts therein alleged, it is not competent to the Court to shut its eyes as to the facts, and thereby usurp a jurisdiction which, on the facts, the Court does not possess.

The *rule nisi* to set aside the award should, in my opinion, be discharged, without costs, and there should be no costs of the re-hearing before us.

WILSON, J.—As to the objection that the motion was not made in time, assuming that the award was published before the first day of last Trinity Term, the Revised Stats. ch. 39. sec. 11, shew there is a Trinity Term, beginning and ending at a determinate period in each year. The Court may, however, by rule, declare, if they think it proper to do so, that sittings during Trinity Term shall not be held: Sec. 13.

The award, if published before Trinity Term, could have been moved in during Trinity Term, because it was a "motion arising subsequently to Easter Term of the same year": Sec. 14.

A Judge is required to sit in open Court every week as well in as out of Term, except in vacation, and from the 24th of December to the 6th of January, for the purpose of disposing of all Court business which may be transacted by a single Judge: Sec. 20.

The Judge so sitting has power to set aside awards.

According to the practice of the Court, by analogy to the 9 & 10 Wm. III, c. 15, sec. 2, the motion to set aside the award should, if the award were published before the first of Trinity Term, have been made before the end of the period fixed for Trinity Term, although the full Court did not sit in that Term, because a Judge was sitting for the Court, who could have entertained the application, and have given the proper relief, or the party could have applied to the Court of Chancery.

The Term was still a continuing period by our statute before referred to, and that period was binding and operative in a case of this kind.

The case of *In the matter of an arbitration between the Governors of the College of Christ, Brecknock, and Martin*, L. R. 3 Q. B. Div. 16, is an authority upon this point, although the enactment as to Terms is not quite like our own.

An award made under the Municipal Act must, in my opinion, according to the terms of section 385, be moved against before the end of the Term next after the publication of the award: *In re Harper v. Great Eastern Railway Co.*, L. R. 20 Eq. 39; *Smith v. Whitmore*, 10 Jur. N. S. 65.

In *Rogers v. Dallimore*, 6 Taunt. 111, the Court allowed a motion to be made on an award in a cause pending in Court, and therefore not strictly within the 9 & 10 Wm. III. sec. 15, after the end of the Term next after the making of the award, although in cases not within the statute the Court was in general governed by the time specified in the statute for giving relief in those cases which were plainly within it.

In re North British Railway Co. v. Trowsdale, L. R. 1 C. P. 401, it was laid down that a motion to set aside an award cannot be made, even with the consent of both parties, later than one Term after the award has been published.

Keating, J., asked: "If both parties agreed that a motion for a new trial should be made after the first four days of Term, would the Court allow it to be made?"

Montague Smith, J., said: "The agreement between the parties was made more than a Term after the award was published."

Erle, C. J., said: "We cannot grant you a rule. All motions to set an award must be made within one Term after the award is published. There have been two or three cases in which this rule has been deviated from, but we are not disposed to add to such precedents."

If one take the initiative within the time required by the statute, and he has not been able to make his submission a rule of Court by reason of its being in the hands of the other party, the Court will give him time to make his mo-

tion perfect ; but if no motion be made within the time limited, no further time will be given to him : *In re Midland R. W. Co. v. Hemming*, 4 D. & L. 795.

When the time has gone by without a motion being made, the Court will not permit it to be made ; they are bound by the statute : *Dodd v. Platt*, 6 Jur. N. S. 631 ; In the matter of *Smith v. Blake*, 8 Dowl. 133.

If this award were published to the parties before Trinity Term, I should be of opinion that it would be too late for either party to move in Michaelmas Term, although neither of the Common Law Superior Courts sat in Trinity Term. Was the award then published in fact before the first day of last Trinity Term ? An award is published "when it is made, and notice has been given to the parties that it is within their reach." *Macarthur v. Campbell*, 5 B. & Ad. 518. It is "published to the parties," within the meaning of the statute, when they have notice of it: *Brooke v. Mitchell*, 6 M. & W. 473.

The affidavit of George M. Macdonnell, Barrister-at-Law, and one of the arbitrators, shewed that the award was made on the 11th of July : that on the day after he wrote to Mr. Agnew, the City Solicitor, informing him of the award, its amount and the arbitration fees : that within a few days after, and before the first of August, he told Rogers, the law partner of Mr. Kirkpatrick, the solicitor of the claimant, and who had acted throughout for her as counsel at the arbitration, that the award had been made, and the deponent informed him also of the particulars of the award ; and a few days after that, and before the first of August, the deponent had a conversation with Mr. Kirkpatrick and Mr. Rogers in their office respecting the award.

It is plain, therefore, there was due notice of the publication of the award given to the respective parties.

The next question is, what is the effect of such dilatory and irregular motion, after the rule has been argued before a single Judge, and after his judgment given upon it, and when the fact is for the first time brought to the notice of the Court upon the re-hearing from the decisions which

have been given? It cannot be said that the irregularity has been waived by the Court or by either of the learned Judges, the one who granted the rule or the one who gave judgment upon it, because the facts were not brought to their attention; nor can we be said to be bound by the conduct of the parties.

That being so, the present application must fail.

I had gone into the merits of the case, but as we are all agreed the objection taken must prevail, there is no necessity for dealing with them.

ARMOUR, J., concurred.

Rule accordingly.

GOWANS ET AL. V. CONSOLIDATED BANK OF CANADA.

Interpleader—Sale of goods—Property passing—Warehouse receipts.

Plaintiffs contracted for the manufacture of a quantity of glassware, which, though invoiced to and paid for by plaintiffs, was stored with a warehouseman as the goods of the manufacturers, who obtained warehouse receipts for them. These receipts were transferred by the manufacturers to defendants, as collateral security for advances made to them.

Held, in an interpleader to try the right to the goods, that there had not been a sufficient delivery of the goods to pass the property in them to plaintiffs, and that defendants were therefore entitled to succeed.

INTERPLEADER issue.

The plaintiffs affirmed, and the defendants denied that a quantity of glassware, in the possession of Stephen McIlraith, as bailee thereof, was the property of the plaintiffs as against defendants.

The issue was tried at the last Winter Assizes for the County of Wellington, before Galt, J., without a jury.

The plaintiffs were in business in Toronto, as dealers in glassware and lamp chimneys. They, from time to time, had dealings with a company of glass manufacturers in Hamilton, called the Burlington Glass Company. In June, 1876, the plaintiffs made a contract with the Glass Company for the manufacture of a quantity of glass chimneys not then specified. The contract was not in writing. Some of the chimneys were to be of special shapes called crimped chimneys, made only for the plaintiffs and according to shapes furnished by the plaintiffs. Others were of the ordinary shapes such as are usually sold in trade. Such goods as were not needed for immediate use, were to be stored by the Glass Company, and shipped as directed. They were to be stored subject to the plaintiffs' orders. The Glass Company were to pay for the storage. In June, 1876, plaintiffs ordered 600 packages. In July, 1876, there was an order for 1,200 packages, and in October, 1876, 800 packages. The Glass Company, from time to time, invoiced the packages as made, and drew for the price. They were stored by the company, according to their letters to the plaintiffs, for the plaintiffs, and at their risk, but they were not so stored in fact. They were stored with Thomas McIlraith, a warehouseman in Hamilton. He received the goods from the Glass Company as being the goods of the company and not of the plaintiffs, and had not, at the time they were stored, any knowledge that they were owned otherwise than by the Glass Company. The number of packages in dispute was 207, some of them (about 76) marked G. K. & Co., and some (about 131) with the letter T. only. The Glass Company failed in June, 1877. Some of the packages marked G. K. & Co., were so marked after the failure.

The warehouseman weekly granted warehouse receipts to the company on goods in store at the end of the week, and not covered by previous warehouse receipts. A few of the warehouse receipts were transferred to the plaintiffs and other purchasers, but the greater part of them were transferred to the defendants, as collateral security for negc-

tible paper discounted by the defendants for the Glass Company.

After the failure of the Glass Company the plaintiffs made a demand upon the warehouseman for seventy-six boxes of lamp chimneys, marked G. K. & Co. T., and one hundred and thirty-one boxes of lamp chimneys marked T., as having been manufactured for and being the property of the plaintiffs. The learned Judge found as follows:—

“I find that the plaintiffs entered into a contract with the Glass Company for the furnishing of a large quantity of lamp chimneys. I find that, from time to time, invoices were made out and sent to plaintiffs by the Glass Company, setting forth that certain quantities of goods had been manufactured. I find that these goods were stored—such as were not required to be forwarded direct to the plaintiffs—in the warehouse of McIlraith, by the Glass Company. I find that the Glass Company drew on plaintiffs for the amount of these goods, and that these drafts were paid. I find that the Glass Company, without notice to the warehouseman of the goods being the property of, or having been appropriated to plaintiffs, obtained warehouse receipts from time to time for all the goods that were in the warehouse. I find that the Glass Company then obtained advances from the Consolidated Bank on the faith of these warehouse receipts, which warehouse receipts were endorsed over to the Bank. I find that the goods in question were covered by these warehouse receipts, although they had been previously invoiced to plaintiffs, and paid for by them.”

Counsel for defendants contended that the learned Judge ought to find that these goods never were accepted or inspected by the plaintiffs.

Counsel for the plaintiffs asked the learned Judge to find that these goods were manufactured by the Glass Company in pursuance of the special contract between the Glass Company and Gowans, Kent & Company, and were stored in the warehouse in pursuance of that special contract, and as soon as they were paid for were accepted.

The learned Judge rendered a verdict for the defendants.

F. Osler, during Hilary Term last, obtained a rule calling on the defendants to shew cause why the verdict entered for them should not be set aside, and a verdict entered for the plaintiffs, pursuant to the statutes in that behalf, on the ground that upon the evidence the plaintiffs were entitled to recover the whole or part of the goods in question.

R. Martin, Q. C., during the same term, shewed cause. The Act intended to make warehouse receipts, promissory notes and mortgages, negotiable. There must be an acceptance by the warehousemen that they hold the goods for the vendee. In this case the warehousemen are only agents for the Glass Company. The Chattel Mortgage Act applies: *Carruthers v. Reynolds*, 12 C. P. 596; *Doyle v. Lasher*, 16 C. P. 263; *McMillan v. McSherry*, 15 Gr. 133; *Howitt v. Gzowski*, 5 Gr. 555.

Osler, contra. There was an arrangement between the plaintiffs and the Glass Company to deliver the goods: *Roper v. Roper*, L. R. 3 C. P. 32. The Chattel Mortgage Act does not apply. The goods were made according to pattern: *Richardson v. Gray*, 29 U. C. R. 360; *Burton v. Bellhouse*, 20 U. C. R. 60.

29th June, 1878. HARRISON, C. J.—The question for decision is, as to the ownership of the goods, the subject matter of the interpleader.

If the property in the goods was vested in the manufacturers at the time of the issuing of the receipts, which were subsequently transferred to the bank, the bank is under 34 Vict. cap. 5, sec. 46, entitled to the verdict.

If before then the property had become vested in the plaintiffs, in whole or in part, the plaintiffs are entitled to the verdict to the extent to which the property was so vested.

The law on the point is thus stated by Lord Campbell, in *Wood v. Bell*, 5 E. & B. 791: "When a man contracts with another to make any article for him for a given price, the general rule is, in the absence of all circumstances from which a contrary conclusion may be inferred, that no property passes in the chattel until it be completed and

ready for delivery ; on the other hand, where a bargain is made for the purchase of an existing ascertained chattel, the general rule, in the same absence of opposing circumstances, is, that the property passes immediately to the vendee; that is, that there is at once a complete bargain and sale. But these general rules are both and equally founded on the presumed intention of the parties. If, in the first, there are attendant circumstances from which the intention may be inferred that the property shall pass in the incomplete and growing chattel as the manufacture of it proceeds, or even in ascertained materials from which it is to be carried to perfection, that intention will be effectuated ; and equally in the latter, if it appear that the parties intended to postpone the transfer of the property till the payment of the price, or the performance of any other condition, such intention will be upheld in the Courts of Law."

Where the contract is not reduced to writing, the enquiry as to the intention about the vesting of the property is generally an enquiry into a matter of fact: *Burnet et al. v. McBean*, 16 U. C. R. 466.

Decided cases, as said by Lord Campbell in *Wood v. Bell*, 5 E. & B. 792, are "mainly useful as serving to guide our judgment in estimating the weight of circumstances as evidences of intention; because, where certain incidents have been held to disclose the intention to pass immediately, or to postpone the passing of property, it may be presumed that succeeding Judges will give a similar effect to the same incidents in succeeding contracts."

The earliest case to which we think it necessary to refer is, *Mucklow et al. (assignees of Royland) v. Mangles*, 1 Taunt. 318. It was an action of trover for a barge. One Royland had agreed to build the barge for one Pocock. Before the work was begun, Pocock advanced money on account, and as it proceeded made more advances till he had paid the full contract price of the barge. When it was nearly finished Royland painted Pocock's name on the stern. Two days after the completion of the barge it was seized on an execution against the goods of Royland, and

it was held, notwithstanding the payment of the contract price and the painting of Pocock's name on the stern of the barge, that the property in the barge had not passed to Pocock.

Heath, J., in delivering judgment, said: "A tradesman often finishes goods which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain: he could not bring trover against the purchaser for the goods so sold. The painting of the name on the stern in this case makes no difference." Lawrence, J., said, "No property vests till the thing is finished and delivered."

In *Atkinson v. Bell et al.*, 8 B. & C. 277, *Mucklow v. Mangles*, was approved, and Bayley J., in delivering judgment, at p. 282, said, "Where goods are ordered to be made, while they are in progress, the materials belong to the maker; the property does not vest in the party who gives the order until the thing ordered is completed. And although, while the goods are in progress, the maker may intend them for the person ordering, still he may afterwards deliver them to another, and thereby vest the property in that other."

In *Carruthers v. Payne et al.*, 2 M. & P. 429, where a chariot had been ordered and built for plaintiff, and after it was finished he ordered a front seat to be added, but the builder neither executed the latter order nor delivered the chariot, and plaintiff ordered it to be sold, it was held, as against the assignees of the builder, that the property in the chariot had passed to the plaintiff.

Best, C. J., in delivering judgment said, "If a case, similar to that of *Mucklow v. Mangles* should again occur, it might deserve some consideration, but this differs from it in this material respect, that after the chariot was complete as a travelling chariot, the plaintiff dealt with it as if it were his own, and it was treated as finished both by him and the builder."

In *Elliott v. Pybus*, 10 Bing. 512, which was an action

for goods bargained and sold, although the defendant had, after the finishing of the machine ordered, refused to pay the price, and the maker refused to deliver without receiving the full price, and defendant afterwards said he would arrange for the full price if he got time, it was held that there was a sufficient acceptance to render the defendant liable for the price, and that without doing any violence to the principles established by *Mucklow v. Mangles* and *Atkinson v. Bell et al.*

Where the builder of a ship not only received instalments of the purchase money during the progress of the work, but before his bankruptcy the ship was measured by the purchaser, and the builder signed a certificate for the registry of the ship in the purchaser's name, the case was held to be distinguishable from *Mucklow v. Mangles*, and the property was held to be in the purchaser: *Woods et al. v. Russell*, 5 B. & Al. 942.

So, where it appeared the purchaser had not only paid the price, but by his agent superintended the building of the ship, and supplied the materials for its construction: *Clarke et al. v. Spence et al.*, 4 A. & E. 448; *Laidler v. Burlinson*, 2 M. & W. 602; *Reid et al. v. Fairbanks et al.*, 13 C. B. 692; *Wood v. Bell*, 5 E. & B. 772, S. C. 6 E. & B. 355.

In *Wilkins v. Bromhead et al.*, 6 M. & G. 963, S. C. 7 N. R. 921, it was held that where a greenhouse was built by the bankrupt for the plaintiff, who paid the price and desired the bankrupt to keep the greenhouse till sent for, and afterwards the bankrupt deposited the greenhouse with a third person for the plaintiff, telling the third person that was the property of the plaintiff, and to keep it for the plaintiff, the property in the greenhouse passed to the plaintiff.

Tindal, C. J., in delivering judgment at p. 973, said: "There was an appropriation on the one side, and an assent to such appropriation on the other, which I think was sufficient to pass the property to the plaintiff."

Erskine, J., at p. 975, said, "It is conceded on all hands

that the rule laid down in *Mucklow v. Mangles* is the correct one * * * Here, however, the greenhouse was completed, and after it was so completed the makers appropriated it to the purchaser."

In *Bank of Upper Canada v. Killaly*, 21 U. C. R. 1, where some of several cars ordered for a railway company had been actually delivered, and the remaining cars were finished, inspected, and approved by the proper officer of the company, it was held that the property in the cars had passed.

The following cases may also be referred to as to what is or is not a sufficient appropriation of goods so as to pass the property in them: *Boulter v. Arnot*, 1 C. & M. 333, 335; *Aldridge v. Johnson*, 7 E. & B. 885; *Langton v. Higgins*, 4 H. & N. 402; *Langton et al. v. Waring et al.*, 18 C. B. N. S. 315; *Young et al. v. Matthews*, L. R. 2 C. P. 127; *Jenner v. Smith*, L. R. 4 C. P. 270; *Martineau et al. v. Kitching*, L. R. 7 Q. B. 436; *Ogg et al v. Shuter*, L. R. 10 C. P. 159; *Anderson v. Morice*, L. R. 1 App. 713.

The reading of these cases satisfies us that in order to the passing of property, either manufactured to order or bought from a larger quantity of the same class of goods, there must, as a general rule, not only be an appropriation on the part of the seller, but an assent to the appropriation on the part of the purchaser.

The last reported case on the point in this Province, *Pew v. Lawrence*, 27 C. P. 402, is to the same effect.

The law appears to be summarized with substantial accuracy in *Story on Sales*, sec. 233, as follows: "Where the contract is executory for the sale of goods not in existence, but to be made or manufactured, no property passes to the orderer until the thing is completely finished, and is either delivered to him or is appropriated for his benefit, set apart for him, and is accepted by him. Nor does it make any difference that the price is advanced, or that the contract contains a specification of the dimensions and other particulars of the thing to be made, and fixes the precise mode and time of payment by months and days,

since the agreement is considered a bargain for an entire thing and not for unfinished parts of it. So also, in such a case, the maker would not be bound to deliver to the purchaser the particular thing upon which he is engaged, and intended for such purchaser, or which the purchaser supposes to be intended for him; but he may, if he please, dispose of it to some other person, and furnish another article corresponding to the specification in the contract." See further, *Addison* on Contracts, 3rd Am. from 7th London ed., s. 567; 1 *Chitty* on Contracts, 11th Am. from 9th London ed., 530.

If the manufacturers in this case had delivered the goods to the warehouseman as and being the goods of the plaintiffs, and the warehouseman so accepted them, there would, we apprehend, be a sufficient delivery to pass the property in the goods to the plaintiffs, but the fact is, that the delivery of the goods to the warehouseman was as and being the goods of the manufacturers, and the warehouseman at the time so received and dealt with them.

Such a delivery cannot be held a delivery of the goods to the plaintiffs so as to pass the property in them to the prejudice of the holder of the warehouse receipt for value. See *Ellershaw v. Magniac et al.*, 6 Ex. 570, note; *Turner et al v. The Liverpool R. W. Co.*, 6 Ex. 549. See further *Gabarron v. Kreeft*, L. R. 10 Ex. 274.

The plaintiffs are the victims of a fraud, but might have prevented it if they had not been so lax in their dealings with the Glass Company.

If we had been of opinion that the property in the goods had passed to the plaintiffs, we should have had to decide whether or not the sale is void, for neglect to register it, as against the plaintiffs, who are *bonâ fide* purchasers for value, but under the circumstances we express no opinion on this point. See *Short v. Ruttan*, 12 U. C. R. 79; *Howett v. Gzowski*, 5 Grant 555; *McMillan v. McSherry* 15 Grant 133; *Burton et al. v. Bellhouse*, 20 U. C. R. 60.

ARMOUR, J., concurred.

Rule discharged.

BROWN ET AL. V. WINNING.

Married woman—Sale of goods to—Separate estate—Examination in another suit—Admissibility in evidence.

Defendant, a married woman, possessed of real estate in Ontario, but living with her husband in Montreal, purchased goods from the plaintiff there, for domestic purposes. There was no evidence of a settlement making the real estate separate estate, or that the marriage took place after the 2nd March, 1872; nor was the debt contracted with reference to her separate estate.

Held, that defendant was not liable to be sued for the price of the goods. The only evidence of defendant's ownership of real estate was her admission, signed by her when under examination in another suit.

Held, clearly admissible.

DECLARATION on the common counts for goods sold and delivered.

Plea, among others, that at the time the debt was contracted the defendant was the wife of Percival Blackburn Winning, a resident of Montreal, in the Province of Quebec.

Replication, that the debt in the declaration was the separate debt of the defendant, and was contracted by her for her own benefit, and in respect of her separate estate.

Rejoinder, that at the time of the contracting of the alleged debt, the defendant and her husband resided at the city of Montreal, and all liability, if any, arose there and that by the law of the Province of Quebec she was not liable to be sued there for the recovery of the alleged debt.

Surrejoinder, that the debt was contracted by the defendant for her own benefit, and in respect of her separate estate in the Province of Ontario.

Second surrejoinder, that the defendant's permanent residence at the time the debt was contracted and the liability incurred was in the Province of Ontario.

Issue on the surrejoinders and on each of the other prior pleadings.

The case was tried at the last Spring Assizes at Cornwall, before Galt, J., without a jury.

The plaintiffs sued to recover the amount of three several accounts for dry goods, consisting chiefly of women's apparel and other necessities for a household, furnished as follows :

1874.—January 20th to December 4th...	\$566 69
Less cash on account.....	141 68
	<hr/>
	425 01
1875.—February 24th to December 27th,	217 91
1876.—January 5th to May 27th.....	153 21
	<hr/>
	\$796 13

The account was kept in the name of the defendant. She had separate property, real estate, in Ontario, which she inherited from her father. She and her husband lived together. They had two houses, one in Montreal and the other in Ontario. Her husband was in business in Montreal, and got into financial difficulties while the account was running. His firm was called Winning, Hill, & Ware. The plaintiffs, on the 28th of November, 1874, rendered an account to the husband, and in the name of the husband, for the first item, and they received and accepted the note of the firm at six months, in settlement. The note was discounted by the plaintiffs, but afterwards protested for non-payment. Plaintiffs proved against the estate for the amount of the note, and received a dividend upon it amounting to \$141.68. While the note was current, defendant continued to get goods from the plaintiffs. The note had only a few days to run when the firm failed. Some of the items in the account were obtained by the defendant's husband. The plaintiffs knew that defendant was the owner of real estate in Ontario.

The only evidence at the trial of her ownership of real estate was her admission in writing, signed by herself when previously under examination in a suit of *Torrance et al. v Winning*, in the Court of Common Pleas. Objection was made to the reception of it, as it was not made in this suit, but the learned Judge received it subject to the objection.

Evidence was also given to shew that by the law of the Province of Quebec, a married woman living with her husband is liable for necessities furnished to the family, and that, whether there is a separation of goods or a community, and that if the husband cannot maintain the family, the wife must support them: that in a suit where it is sought to enforce the community, the husband and wife ought to be parties to the suit, but in a suit to recover the value of necessities, this rule does not apply; and that the real estate of the wife owned before marriage does not fall into the community.

This closed the case for the plaintiffs.

A nonsuit was then moved.

The learned Judge was not satisfied that the credit was given on the responsibility of the defendant. He found that when the account was opened, the husband was engaged in business and was in good credit: that the first account was settled by the note of the husband's firm: that the credit, so far as the first account was concerned, was given to the husband; and, acting on the opinion that there was no special contract by the wife to charge her separate estate, he entered a nonsuit, reserving leave to plaintiffs to enter a verdict for the whole, or such part of the demand as the Court might think the plaintiffs entitled to recover.

23rd May, 1878, *S. Richards, Q. C.*, obtained a rule calling on the defendant to shew cause why the nonsuit should not be set aside and a verdict entered for the plaintiffs for \$796.13, or for such other sum as the Court might direct, on the ground that the goods, or some of them, were sold on the credit of the defendant, and that the debt was a debt of the defendant, and that she was possessed of separate estate; and that, on the evidence, the plaintiffs were entitled to recover for the goods sold, or some of them; or why the nonsuit should not be set aside and a new trial had between the parties, on the grounds above mentioned, and that there was evidence entitling the plaintiffs to recover.

F. Osler, 30th May, 1878, shewed cause. There is no

evidence that credit was given to the separate estate. The wife is *prima facie* the husband's agent. Plaintiffs proved their debt against the husband's estate and received his notes and those of the firm for it. No separate contract is proved, nor is it shewn when defendant was married, nor is there any evidence of a separate estate. He referred to *Field v. McArthur*, 27 C. P. 15; *Kerr v. Stripp*, 24 Gr. 198; *Wagner v. Jefferson*, 37 U. C. R. 551; *McCready et al. v. Higgins*, 24 C. P. 233; *Darling v. Rice*, 1 App. R. 43. The examination in the previous suit was not admissible as evidence in this.

Richards, Q. C., contra. The account was opened in the name of the married woman. The goods were all for her personal wear, and she said she wanted them charged to herself. By the law of Lower Canada it was proved she would be liable, and the presumption is, that she is liable: *Story's Confl. L.* 66 (a). The domicile of the parties was in Lower Canada, and by the law of her domicile she had authority to contract. The nonsuit should not have been entered.

29th June, 1878. HARRISON, C. J.—We know of nothing to prevent a married woman, having separate property in the Province of Ontario, from making a contract, out of the Province, on the faith of it, and in reference to it, enforceable against her in the Courts of this Province. See *McHenry v. Davis*, L. R. 10 Eq. 88.

The Superior Courts of this Province have jurisdiction to try all transitory actions wheresoever arising, provided the defendant is either a resident of the Province or voluntarily submits to the jurisdiction of the Court: *McLaren et al. v. Ryan*, 36 U. C. R. 307; *The Buenos Ayres and Ensenada Port R. W. Co. v. The Northern R. W. Co. of Buenos Ayres*, L. R. 2 Q. B. Div. 210. But a person suing, in this Province, on a contract made out of the Province, must take the law as he finds it here. He cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here.

While the contract is to be expounded according to the

law of the country where made, the law of the country where the contract is being enforced must prevail in enforcing such contract: *De la Vega v. Vianna*, 1 B. & Ad. 284; *Don v. Lippman*, 5 C. & F. 1, 20; *McFarlane v. Norris*, 2 B. & S. 783; *Darling et al. v. Hitchcock*, 28 U. C. R. 439.

The Legislature of the Province of Ontario has not yet empowered a married woman, in all cases, to contract as if she were a *feme sole*: *Wagner v. Jefferson*, 37 U. C. R. 550, 561. Her only power to contract, and her own liability in respect of contracts, is where the contract has been made under the conditions provided by the Legislature: *Kerr v. Stripp*, 40 U. C. R. 125, S. C. 24 Grant 198. These are, either that the contract was made in respect of some separate employment in which she was engaged—see *Harrison v. Douglas*, 40 U. C. R. 410; *Meakin v. Samson et al.*, 28 C. P. 355—or that at the time of the making of the contract she was possessed of separate property: *Field v. McArthur*, 27 C. P. 15; and contracted upon the faith of it: *Wagner v. Jefferson*, 37 U. C. R. 551.

This was the rule laid down by Draper, C. J., in *Darling et ux. v. Rice*, in the Court of Appeal, and by the other Judges, in the same case, who expressed any opinion on the point—see 1 App. R. 46, 48—and has since been followed in that Court in *Standard Bank v. Boulton (a)*, and *Lawson v. Laidlaw (a)*.

Where a contract under these conditions is shewn, the contract may be enforced against the wife without the husband being a party to the action: *Merrick v. Sherwood*, 22 C. P. 467; *Darling et al. Rice*, 1 App. R. 46, 52.

Where goods are sold and delivered by a tradesman in this Province to a married woman in this Province, upon her express promise to pay out of her separate estate, and upon the faith and credit of that estate, the vendor becomes her creditor, and she alone, and not her husband, the debtor. See per Gwynne, J., in *Merrick v. Sherwood*, 22 C. P. 467,

(a) Not yet reported.

475, approved by Draper, C. J., in *Darling v. Rice*, 1 Ap. R. 44.

Real estate, situate in this Province, in which the husband has an interest as tenant by the curtesy, is not separate property within the meaning of and for the purpose of the Acts: *Royal Canadian Bank v. Mitchell*, 14 Grant 412, 416, 420; *Mitchell v. Weir*, 19 Grant 568, 571; *McCreedy v. Higgins*, 24 C. P. 233; *Johnstone v. White*, 40 U. C. R. 309; *Thompson et al. v. Dickson*, 28 C. P. 225; *Standard Bank v. Boulton*, Court of Appeal. (a)

The Act of 1872 did not have the effect of divesting the estate of the husband before then acquired in the land of his wife: *Dingman v. Austin*, 33 U. C. R. 190; but there is no reason why the separate property of the wife, acquired after the passing of the Act, should not be held separate property under the Act of 1872, although the marriage took place before the passing of that Act: *Lawson v. Laidlaw* (a).

The real estate of a married woman, married after the 2nd of March, 1872, whether owned by her at the time of her marriage, or acquired in any manner during coverture, may be held and enjoyed by her free from any estate of the husband during her life: Revised Statutes of Ontario, ch. 125, sec. 4.

This Act confers upon the property in possession of a married woman, married after the Act of 1872 came into force, or acquired after that date, the quality of separate estate: *Adams v. Loomis*, 22 Grant 99; *Boustead v. Whitmore*, 22 Grant 222.

The evidence, so far as it has any bearing on the point, indicates that the real estate was acquired long before 1872, and fails to shew any marriage settlement making it an estate in possession, and fails to shew when the marriage took place.

This is the principal weakness in the plaintiffs' case.

There is no evidence whatever either of a settlement making the real estate separate estate, or that the marriage

was after the 2nd of March, 1872, in which event there would be the statutory settlement, so as to make her real estate situate in the Province separate property for the purpose of her contracts.

The action necessarily fails, on the ground that there is no separate trading or separate estate proved within the meaning of our law, and in this view it is needless to enquire whether credit was given to the defendant on the faith of it for the whole or any part of the account for which she is sued.

This difficulty in the plaintiffs' way has arisen from the fact that the plaintiffs, rather than postpone the trial for the attendance of the defendant, who, although subpoenaed, was too ill to attend as a witness, rested their case upon her written examination given in another case.

While we are of the clear opinion that the examination was admissible evidence—see *Fleet v. Adams*, L. R. 2 Q. B. 536—we fail to discover in it any evidence of separate property, either under the operation of a marriage settlement made before the Act of March, 1872, or of a marriage since that Act, or property acquired since that Act.

For all that appears the husband has an interest in the land of the wife, or the estate of the wife is not an estate in possession, and so the land is not separate property for the purposes of this action.

The nonsuit was, in our opinion, right.

ARMOUR, J., concurred.

Rule discharged.

LUCAS v. THE CORPORATION OF THE TOWNSHIP OF MOORE.

Highway—Want of repair—Death resulting from—Contributory negligence—Evidence.

Plaintiff's husband was found dead in a ditch along defendants' highway, the hub of his waggon wheel resting upon him, the waggon being in a dilapidated condition, and he fastened down very tightly. One of his horses was dead. The ditch was about 12 feet deep and 32 feet wide, much wider at the top than at the bottom, and extending about half way into the travelled road, which it appeared had been in this condition for several years. There was no railing or other guard round the ditch, and nothing to indicate the situation on a dark night, such as the night in question was. It was alleged that deceased was under the influence of liquor, though there was contradictory evidence on this point; but there was no direct evidence as to how he fell into the ditch.

Held, that there was evidence for the jury of non-repair of the road within the meaning of the present Municipal Act, and that such non-repair was the cause of the death; and that, assuming there was a breach of duty on defendants' part, deceased having been lawfully using the highway, it might be fairly inferred that but for such breach of duty the accident would not have occurred.

The question of contributory negligence having been left to the jury and found in plaintiff's favour, the Court refused to disturb the verdict.

Remarks as to what is misdirection on the part of the Judge at the trial.

ACTION for negligence by the plaintiff, as administratrix of James Lucas.

The first count of the declaration alleged that the defendants neglected to keep a part of a public road in the township in repair, and left a deep ditch, break or excavation in said road, without sufficient protection to persons using the road, and left the same after nightfall without any light or signal being placed near the same, and by reason of the neglect James Lucas, after nightfall, fell into the ditch, and was killed thereby.

The second count alleged that defendants caused and permitted a certain ditch to be dug in the public highway, and negligently left the same unsecured, so as to be dangerous to persons passing along, nor did they place any light, signal, or watch thereon, and while the same was so unsecured the said Lucas was lawfully passing along the said highway, and fell into the said ditch, and was killed thereby.

The defendants pleaded not guilty.

Issue.

The case was tried at the last Spring Assizes for the county of Lambton, before Armour, J., and a jury.

The deceased was a farmer. He met with his death on the night of 6th December, 1877. He was found dead in a ditch on the fifth concession line of the township of Sarnia. The hub of his waggon wheel was on top of him. The hind wheels of the waggon were turned completely over. The fore wheels were on their side. He was fastened down very tightly. One of the horses was dead. The ditch was on the north side of the road. It was twelve feet deep and thirty-two feet in width, and extended a considerable distance in length along the highway. It was much wider at the top than the bottom. The road had been in that condition for six or seven years, or longer. The ditch had been, from year to year, increasing in size. A small flask was taken out of the pocket of the deceased. It was about two-thirds full. The tracks of the waggon were found leading to and over the side of the ditch. The night on which he fell into the ditch was very dark. There was evidence he had been drinking and was somewhat under the influence of liquor that night, but the evidence on the point was contradictory. He before that had frequently travelled the road.

There was no railing or other guard about the ditch—nothing to indicate its situation on a dark night. There were, it was said, many such ditches on highways in the township, and equally unprotected; the roadway between fences there was sixty-six feet. The ditch occupied about half of that way, and was very near to the travelled part of the road. The ditches were originally made for the purpose of taking away the water from the concession lines. The Government had lately made other drains in the township which carried off most of the water which generally passed through these ditches. The ditch in question had gradually changed from a small water-course to a big gully. It was originally dug by the council for drainage purposes.

There was no direct evidence as to how or by what means the deceased fell into the ditch.

Counsel for the defence, at the close of the plaintiff's case, objected that no negligence had been shown on the part of the corporation, and that even if there were such

evidence, there was no proof that the negligence of the defendants' was the cause of the disaster.

The learned Judge ruled that there was evidence on both points for the consideration of the jury.

Testimony was then called for the defence, chiefly for the purpose of shewing that the deceased was intoxicated on the night he fell into the dieth. Evidence in reply was also given.

The learned Judge then left the whole case to the jury. He asked them if, upon the evidence, they were satisfied the deceased, while passing along the highway, fell into the gully and was killed. He directed them that the corporation were bound to keep their highways in repair. He asked the jury to say whether, in their opinion, the road at the time of the accident was in a reasonable state of repair. He told the jury that the whole 66 feet width of road belonged to the public, and that they were entitled to have the whole of it in a reasonable state of repair if the whole were required. He described the size and situation of the gully as it appeared according to the evidence, and in the course of his remarks said: "If the corporation were indicted for having the road in that position, there can be no doubt that a jury would be directed to find them guilty of having the road out of repair. Where a ditch becomes such a deep and dangerous place as this, the corporation are bound to put a guard on it, otherwise, as a matter of law, they are guilty of negligence in not guarding it." But he also told the jury that the question of repair or non-repair, notwithstanding any expression of his opinion, was a matter entirely for their consideration. In the event of their finding negligence on the part of the defendants, he directed them to find a verdict for the plaintiff, unless satisfied upon the evidence that the deceased, by his carelessness and negligence, caused or contributed to his own death.

The learned Judge then reviewed the evidence bearing on the question of contributory negligence, and in conclusion said, "Whether he was drunk or sober, if he was driving carelessly or negligently, and was the cause of his own death, then you will find a verdict for the defendants."

Counsel for the defendants objected to the charge on several grounds.

The jury found a verdict for the plaintiff for \$2,500, distributed as follows: \$1,000 to herself, and the remainder to her three children, in sums of \$300, \$450, and \$750.

Ferguson, Q. C., 23rd May, 1871, obtained a rule calling on the plaintiff to show cause why the verdict for her obtained in this cause should not be set aside and a non-suit entered instead thereof, or a new trial had between the parties, pursuant to leave reserved, and the Common Law Procedure Act, on the grounds :

1. That there was not any evidence that the road or highway, at the place in question, was not in repair, the evidence, on the contrary, shewing that it was in good repair, the ditch, trench, or excavation mentioned in the declaration, not being or constituting a want of repair of the said highway within the meaning of the statute obliging the defendants to keep the highway in repair.

2. That there was not any evidence to go to the jury that what was complained of as a want of repair of the said highway was the cause of the injury sustained and grievance complained of.

3. That there was ample evidence showing that the said grievance was occasioned by the negligence of the said James Lucas, deceased, or that he was guilty of contributory negligence, but for which the accident would not have occurred.

4. That the said verdict was contrary to law and evidence in this, that the evidence failed to shew negligence on the part of the defendants, or that the alleged non-repair of the road was the cause of the injury complained of, and did shew that there was negligence on the part of the said James Lucas, deceased, but for which the accident would not have happened.

And for misdirection of the learned Judge who tried the cause, in telling the jury that the defendants were liable to be indicted, and were responsible in damages for

having the said ditch, trench or excavation, in the place where it was, and as it was shewn to be.

And for want of direction by the learned Judge.

(1.) In not telling the jury that having the said ditch, trench or excavation where it was, in the condition in which it was shewn to be, was not a want of repair of the said road or highway, within the meaning of the statute.

(2.) In not telling the jury that there was no evidence to shew how or from what cause the accident complained of occurred, and that this being so, the plaintiff could not recover.

F. Osler, 7th June, 1878, shewed cause. The direction to the jury was right. *Toms v. Whitby*, 37 U. C. R. 100 ; R. S. O., ch. 104, sec. 491. The mere fact of accident is not evidence of negligence : *Shearman & Redfield* on Negligence, 3rd ed., secs. 9, 13 ; *Williams v. Great Western Railway Co.*, L. R. 9 Ex. 157 ; *Wharton* on Negligence, sec. 421.

As to contributory negligence, the jury found there was none. *Hutton v. Windsor*, 34 U. C. R. 487, is distinguishable.

Robinson, Q. C., and *Fergusou*, Q. C., contra. The circumstances of the municipality must be taken into consideration. There was no evidence of negligence, there being thirty-two feet of good road. But if there were, did it cause the accident ? *Giles v. Great Western R. W. Co.*, 36 U. C. R. 360 ; *Singleton v. Eastern Counties R. W. Co.*, 7 C. B. N. S. 287. This may be described as the case of an unexplained accident.

Then, as to contributory negligence, the evidence shews the direction of the carriage wheel, and the intoxication of deceased. The observations by the learned Judge were unwarranted, laying down the law hopelessly, as he did, against the defendants, and stating that as a matter of law defendants were guilty,

He referred to *Blackmore v. Toronto Street R. W. Co.*, 38 U. C. R. 172 ; *Dougherty v. Williams*, 32 U. C. R. 215 ; *White v. Crawford*, 2 C. P. 352. They commented on the evidence as to the intoxication of deceased, and cited *McGunigal v. Grand Trunk R. W. Co.*, 33 U. C. R. 194.

June 29, 1878, HARRISON, C. J.—The duty of a Municipal Corporation is to keep its highways in repair, and neglect of this duty subjects the corporation to an action for damages at the suit of any person suffering by reason of the neglect: R. S. O., ch. 174, sec. 491.

The question whether a highway is in repair or not, at the time of the occurrence of the grievance complained of, is a question of fact.

In the determination of this question it is necessary to take into account the character of its roads, the care usually exercised by municipalities in reference to such roads, the season of the year, the nature and the extent of the travel, the place of the accident, and the manner and nature of the accident.

When a highway is in such a state, from any cause, whether of nature or man, that it cannot be safely or conveniently used by the travelling public, it may be properly said to be out of repair.

Whether the defect be an excavation caused by nature or man, or an addition making an obstruction caused by nature or man, it may be equally unsafe and equally inconvenient to the public to use the highway.

The foregoing is in effect the language already used by this Court in *Castor v. Uxbridge*, 39 U. C. R. 122.

In the case of an ordinary highway in England, although it may be of varying and unequal width, running between fences on each side, the right of passage or way *primâ facie* extends to the whole space between the fences, and the public are entitled to the entire of it, as the highway, and are not confined to the parts which may be metalled or kept in repair for the more convenient use of carriages or foot passengers. See per Martin B., in *Regina v. The United Kingdom Electric Telegraph Co.*, 3 F. & F. 74, 75.

The authorities referred to at p. 402 of the third edition of the Municipal Manual, shew that the obligation to keep highways in repair in the United States, is confined to the *via trita* or travelled way.

It would not be reasonable in this country to expect

municipal corporations to keep the sides of the highway in the same state of repair as the travelled way ; but it is necessary to hold that municipal corporations are not entirely free from the burden of keeping the whole highway in a reasonable state of repair, looking at its situation, use, and other attendant circumstances.

The existence of pits, precipices, and deep water, either within the boundaries of the highway, or adjoining thereto, may, in some cases, be so dangerous to the use of the highway by travellers, as to amount to non-repair within the meaning of the statute.

The Legislature, which has imposed on municipal corporations the burden, at the risk of an action for damages, of keeping their highways in repair, has also empowered the corporations to pass by-laws for making regulations as to pits, precipices, deep water, and other places dangerous to travellers, (sub-sec. 3 of sec. 509 of R. S. O., cap. 174.)

This is important, as manifesting, on the part of the Legislature, some idea of what things may be looked upon as dangerous to travel in the use of highways, and so, in effect, non-repair within the Municipal Act.

This enactment was, in *Toms et ux. v. Whitby*, 35 U. C. R. 210, looked upon as a special ground of obligation and responsibility upon the municipal corporations.

In that case, Mr. Justice Wilson, at p. 208, said, "It is reasonable the public should be protected from all danger on the highways, if possible, by due repairs, or by other proper means ; but, at any rate, from all danger which is very great, or which may happen to persons using ordinary care on the highway, or which can be provided for at a reasonably small expense."

The same learned Judge, at p. 209, said, "I am of opinion that if a guard or fence were necessary to make this road or bridge safe for the public use, that it was the duty of the defendants to furnish such protection, and if they did not do it, and damage has resulted therefrom, that they are liable civilly in an action for the injury sustained."

Richards, C. J., at p. 225 of the same case, said, "The ground on which I think the defendants are liable is, that the bridge and railing were not in such a state as might be reasonably expected and the public had a right to demand, considering the circumstances of the defendants and the nature of the highway."

This decision was afterwards affirmed by the Court of Appeal. The decision of the Court of Appeal is reported in 37 U. C. R. p. 100.

The late lamented, learned, and distinguished Chief Justice of that Court said, p. 104, "I am of opinion that, under our Municipal Act of 1866, which was the law in force when the accident occurred which was the subject of this action, the defendants were subject to the obligation of paving, grading, and keeping in a reasonable state of repair that part of the highway where the plaintiff Elizabeth Toms was so severely injured as has been proved."

The law, as expounded in this case, in our opinion, establishes that there was evidence of non-repair of the road in question, within the meaning of the present Municipal Act, for the consideration of the jury, and the effect to be given to that evidence ought not to be lessened by reason of the fact that the ditch was originally constructed by the defendants themselves, and has been, from year to year since, allowed to expand until it has eaten away half of the highway, and still is left without fencing, railing, or other suitable and cheap protection.

If there was evidence that the negligence of the defendants was the cause of the accident, and no misdirection on the part of the learned Judge who tried the cause, the verdict for the plaintiff ought not to be disturbed.

In order to subject defendants to damages, it is undoubtedly necessary to shew not only circumstances from which it may be inferred that there were precautions which the defendants might and ought to have taken, but that the death was the result of the neglect to take these precautions.

The objection is, that there was not any evidence to go

to the jury that what was complained of as a want of repair of the highway was the cause of the injury sustained.

There are cases of negligence in which the very nature of the accident may of itself, and through the presumption which it carries, supply the requisite proof—*Wharton* on Negligence, sec. 421—and the question is, whether this is not one of them.

No one saw the deceased drive into the ditch; but may it not be fairly inferred from its situation, and his situation when found, taken in connection with the surrounding facts, that the existence of the ditch was the cause of the death? If yea, the verdict ought not to be disturbed.

In *Czech et al. v. The General Steam Navigation Co.*, L. R. 3 C. P. 14, it appeared that goods were shipped on board a steamer under a bill of lading, which contained an exception from liability, for “breakage, leakage, or damage.” The goods were found at the end of the voyage to be injured by oil. It was proved that there was no oil in the cargo, but it appeared that there were two donkey engines on deck, near the place where the goods were stowed, in lubricating which oil was used; and, although there was no direct evidence of how the injury to the goods occurred, it was held that, on the facts, a jury was fairly justified in finding negligence.

Bovill, C. J., at p. 18, said, “The evidence in every case must vary according to its peculiar circumstances; but if the goods are damaged, and no reasonable explanation can be given, except the negligence of the defendants, a jury are justified in finding that such negligence is proved.”

The case of *Singleton v. The Eastern Counties R. W. Co.*, 7 C. B. N. S. 287, relied upon by the defendants in support of their contention, is distinguishable from the case before us.

It was an action against the Eastern Counties Railway Co. for negligence. The plaintiff, a child, three and a half years old, in some manner strayed upon the line of railway, and had his leg cut off by a passing train. There was no evidence to show how the child got to the place where

he was, but it was supposed that he got through a fence at the place where the rail crossed. A nonsuit was asked and obtained, on the ground that there was no evidence of negligence shown on the part of the defendants, and contributory negligence on the part of the plaintiff.

Erle, C. J., in delivering judgment, said, "The plaintiff was wrongfully upon the railway, and without saying anything to detract from the authority of the cases cited, I must confess being wholly unable to discover any evidence of negligence on the part of the servants of the company."

Williams, J., said, "I also think there was no negligence on the part of the company: there was nothing to shew how the child got on the railway. All was mere conjecture and surmise."

If it had appeared that there was neglect in the running of the train, and that the child was lawfully on the railway, we would infer that the decision would have been different; and this supposition is strengthened by a reference to the more recent case of *Williams v. The Great Western R. W. Co.*, L. R. 9 Ex. 157.

The defendants' line of railway crossed a public footpath on the level, but the defendants, neglecting the provisions of statute 8 & 9 Vic. ch. 20, sec. 61, had not erected any gate or stile for the protection of the travelling public. The plaintiff, a child of four and a half years old, having been sent on an errand, was shortly afterwards found lying on the level crossing, a foot having been cut off by a passing train. There was no evidence to shew how the child had come there, beyond the fact that he had been sent on an errand a few minutes before from the cottage where he lived, which lay by the roadside, about 300 yards distant from the railway. Notwithstanding, it was held that there was evidence to go to the jury that the accident was occasioned by the negligence of the defendants.

Kelly, C. B., said, at page 160: "It is true these are only *possibilities*; but being such, and negligence being established, the question is, whether, considering the short time which had elapsed since the child left home, and all

the other circumstances of the case, a jury may not have been very well satisfied that *one* or the *other* of those possibilities would have happened, and that if this stile had been there this accident would not have occurred."

Amphlett, B., said, at p. 162, "The child being lawfully on the footway, and the defendants being guilty of a breach of duty, the only question is, whether there is reasonable ground for connecting this breach of duty with the accident. It is not necessary to decide this as a jury: it is enough to say that I think it was clearly a case which ought to be submitted to a jury."

This reasoning appears to us to be strongly in favour of holding that there was evidence here for the consideration of the jury. For the purpose of deciding this question, it must be assumed that there was a breach of duty on the part of the defendants. There being that breach of duty, and the plaintiff having been lawfully using the highway, it may, we think, be fairly inferred by a jury that but for such breach of duty the accident would not have happened; in other words, that the accident was the result of the breach of duty.

Indeed, looking at the situation of the deceased when found, and of his waggon and horses, and of the tracks of wheels leading to the edge of the ditch, it is more natural to infer that the ditch was the cause of his death, than that there was any other cause.

The case of *Giles v. Great Western R. W. Co.*, 36 U. C. R. 360, referred to by the defendants, was a very peculiar case, and also very different in its facts from the one now before us.

The deceased was a passenger on the defendants' railway for White's Station, on the London and Port Stanley Railway, and was, as the conductor said, pretty drunk when he got on the train. He went out of the car door at that station, and next morning was found about 100 yards beyond the station, four feet from the rail, with his legs cut through at the knee joints and his left foot crushed, of which injuries he afterwards died. There was contra-

dictory evidence as to whether the train stopped long enough at the station to enable passengers to alight. There was no further evidence of the manner in which the deceased met his death. The jury found a verdict for the plaintiff. On a motion to enter a nonsuit, Wilson, J., concluded his judgment by saying, at p. 371, "The case is one of so uncertain and unsatisfactory a nature that I do not see in what way the defendants can be charged with negligence in causing the death of the unfortunate deceased." Morrison, J., concurred; but Richards, C. J., without dissenting, was inclined to think, on the authority of *Williams v. The Great Western R. W. Co.*, L. R. 9 Ex. 157, that the fact that the deceased was taken on the train while intoxicated, with the knowledge of the conductor, and the very short stoppage at the station, afforded some evidence to go to the jury of the negligence of the defendants.

It is unnecessary for the decision of this case to overrule that case; but I may say, without intending any disrespect to the experienced and able Judges who formed the majority of the Court, that I thought at the time, and still think, the Chief Justice was right, and the majority of the Court wrong. I, at the time, being counsel for the plaintiff, confidently recommended an appeal of the case, but unfortunately the family of the deceased had, as I was told, been reduced to poverty by the death, and were not in a position to give the necessary bond, and were obliged to acquiesce in a decision which I felt was not only opposed to *Williams v. Great Western R. W. Co.*, L. R. 9 Ex. 157, on which I strongly relied, but to the presumption fairly arising on the evidence.

The present case however differs from that case. There, assuming negligence on the part of the defendants, there may have been a possibility, looking at the position of the body when found, that the death arose otherwise than from the negligence of the defendants; but here, looking at the position of the body in the bottom of the ditch, and the other circumstances, there is not only a possibility, but a strong probability that the ditch, and nothing but the

ditch, was the cause of the death; and the only question springing from it is, whether the deceased had, by his own want of care, directly contributed to his death.

The latter was a question for the jury on evidence which was contradictory. The jury having had the distinct question submitted to them, have answered it in favour of the plaintiff. Having carefully read the evidence and listened to the argument, I cannot say that the evidence so preponderates against the verdict that we should on this ground set it aside.

It would not have been any surprise to the learned Judge who tried the cause, if the jury on this ground had rendered their verdict for the defendants. If they had done so, I would not have interfered with the verdict for the defendants, and for the same reason that I now think I should not interfere with the verdict for the plaintiff.

The evidence was such that the jury might find either verdict without being open to the imputation of having rendered a verdict against evidence. The evidence in *McGunigal v. The Grand Trunk R. W. Co.*, 33 U. C. R. 194, was all one way, and the learned Judge being dissatisfied with the verdict, it was set aside. In this case the evidence is conflicting, and the learned Judge not dissatisfied with the verdict.

This disposes of all the grounds for a new trial assigned in the rule, with the exception of those alleged as grounds of misdirection and non-direction.

It is not everything which is said by a Judge to a jury which is to be held the subject of misdirection, nor is it every misdirection which is to be held a ground for a new trial.

Whatever mistake may be made by a Judge in misdirecting a jury in point of law, unless it immediately applies to the subject matter, and goes directly to the point which the jury has to determine, limiting and directing their verdict in point of fact, is wholly unimportant with reference to the right of a suitor to a new trial: Per Pollock, C. B., in *Norbury v. Kitchen*, 7 L. T. N. S. 685.

It is no ground for a new trial that the Judge has expressed an opinion to the jury on a question of fact, provided he did not withdraw the consideration of the question from them, even although the opinion expressed was incorrect: *Taylor v. Ashton*, 11 M. & W. 417; *Doe Fareweather v. Nevers*, 3 Pug. N. B. 614.

Where a new trial is moved on the ground of misdirection in point of law, if the Court see that justice has been done between the parties, they will not set aside the verdict: *Edmondson v. Macnell*, 2 T. R. 4; *Connell et al. v. Cheney*, 1 U. C. R. 307.

It is not the practice, as sometimes assumed at the bar, to grant a new trial *de jure*, in all cases of misdirection, because a bill of exceptions might have been tendered, for when the Court can see clearly that real and substantial justice has been done, or may be done, without a new trial, the rule has been refused: See per Tindal, C.J., in *Moore v. Tuckwell*, 1 C. B. 609.

A new trial is not now granted on the ground of misdirection, unless in the opinion of the Court, in which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action: R. S. O., cap. 50, sec. 289.

In *Taylor* on Evidence, 7 ed. 37, "It may be well," it is said, "doubted whether in the great majority of instances it would not promote the real ends of justice if the Judge were temperately to state what opinion he had formed respecting the merits of the case, and the mode by which he had arrived at his conclusions. The jury would still have the undisputed power of deciding the question as they thought fit, but they would have the advantage of being advised by a man no more liable than themselves to prejudice or partiality, whose long experience in Courts of Justice must of necessity have rendered him far more competent than they can be to unravel the tangled threads of conflicting testimony. The too common mode of summing up, 'Gentlemen, if you think so and so, you will find for the plaintiff, if you think otherwise you will find for

the defendant; the question is for you,' though sanctioned by the practice of many able but somewhat lazy Judges, and though possibly in accordance with the strict theory of trial by jury, is but little calculated to promote the attainment of truth, and, in complicated cases before a petty jury, is almost tantamount, if not to a direct denial of justice, at least to a decision of the issue by lot."

This section has been quoted with approbation, both by Wilson, J., in *Dougherty v. Williams*, 32 U. C. R. 216, and by Weldon, J., in *Doe Fairweather v. Nevers*, 3 Pugs. N. B. 620.

In the former case, the learned Judge, Wilson, commented very strongly, and, as counsel for the plaintiff at the time, I thought too strongly, on the facts, and charged very strongly, and I thought too strongly, against my client; but as he submitted the whole case to the jury, the full Court, as then constituted, afterwards refused to grant a new trial.

The rule appears to be, that a Judge may fairly analyse the evidence, present the questions of facts resulting from it, and express his own opinion of its weight, leaving the jury, however, at full and active liberty to decide for themselves: *Delaney v. Robinson*, 2 Wharton 507.

Much must, in every case, be left to the good taste, sound judgment and discretion of the presiding Judge.

In *Commonwealth v. Magee*, reported in 12 Cox 549, it was held that a Judge may, where the evidence is clear and uncontradicted, and the character of the witnesses unimpeached and unshaken, tell the jury, even in a criminal case, that it is their duty to convict.

The Queen v. The Port Perry and Port Whitby R. W. Co., 38 U. C. R. 431, in this Court, is to the same effect.

If the charge is calculated to make an impression on the jury prejudicial to a party, which the evidence does not entirely warrant, the Court may, in the exercise of discretion, grant a new trial. See *Davidson v. Stanley*, 2 M. & G. 721; *Simpson v. Clayton*, 2 Bing. N. C. 467; *White v. Crawford*, 2 C. P. 352.

The misdirection complained of here is, that the learned Judge told the jury that the defendants were liable to be indicted, and were responsible in damages for having the ditch in the place where it was, and as it was shewn to be. The learned Judge, according to the very full report of his charge made by the short-hand reporter, does appear to have made this observation; but it must be taken, we consider, with the many other observations which he made to the jury in the course of the same charge. Immediately after making it he told the jury that the question of repair or non-repair was a matter entirely for their consideration, regardless of his opinion. Nothing whatever was withdrawn from their consideration. Nothing was intended by the learned Judge to have been withdrawn from their consideration. The observation, when taken in connection with the remainder of his charge, is really no more than a strong observation on the evidence, and one which, I am bound to say, is fully warranted by the evidence. The verdict ought not to be set aside on this ground.

The remainder of the rule asks for a new trial on the ground of non-direction.

Non-direction is no ground for a new trial, unless the verdict appears to the Court to be contrary to the evidence: *Ford v. Lacey*, 30 L. J. Ex. 351; *Great Western R. W. Co. v. Braid*, 8 L. T. N. S. 31.

The non-direction complained of is upon two points:

1. In not telling the jury that having the ditch where it was, in the condition in which it was shewn to be, was not a want of repair of the road or highway within the meaning of the statute.

2. In not telling the jury that there was no evidence to shew how or from what cause the accident complained of occurred, and that this being so, the plaintiff could not recover.

The first of these is involved in the first ground for a new trial on the evidence, and the second in the second ground for a new trial on the evidence.

We have expressed our opinion that, as against both of

these objections, the verdict is sustained by the evidence, and this disposes of the two alleged grounds of non-direction.

ARMOUR, J., concurred.

Rule discharged.

O'DONOHUE V. WILEY ET AL.

Foreign contract—Breach out of jurisdiction.

Defendants, merchants in New York, telegraphed to the plaintiff, an attorney practising in Toronto, in answer to a telegram from him offering his services, to represent them in certain insolvency proceedings pending in the latter place. Plaintiff did so, and upon rendering his bill for services, which he did by letter, addressed to defendants at New York, defendants, by letter from New York, addressed to plaintiff at Toronto, refused payment. *Held*, that the plaintiff could not recover, as both contract and breach arose out of the jurisdiction.

Held, also, following *Spittal v. Jackson*, L. R. 5 C. P. 542, that the words "cause of action" (Rev. Stat. O., ch. 20, sec. 49), do not mean the *whole* cause of action—*i. e.*, breach and contract, but breach alone.

ACTION on the common counts for work done and materials provided by the plaintiff for the defendants, at their request.

Pleas, never indebted, and payment.

Issue :

The issues were tried at the last Assizes for the County of York, before Armour, J., without a jury.

The plaintiff, an attorney, residing in the city of Toronto, sued the defendants, who were foreigners, residents of the city of New York, to recover \$614.72, being the amount of a bill of costs in respect of professional services rendered in this Province by the plaintiff for the defendants.

The defendants were served, under the Common Law Procedure Act, with process in New York.

The defendants, on the 1st March, 1878, obtained a summons calling on the plaintiff to shew cause why the writ of summons and declaration in the cause should not be set aside; but, upon the written undertaking of the plaintiff to prove a cause of action which had arisen within the jurisdiction of the Court, the summons was discharged.

The firm of O'Donohoe & Meek, of which the plaintiff at the time was a member, on the 6th March, 1876, telegraphed from Toronto to the defendants in New York, to know if they might act for the defendants in the matter of the estate of Bendelari, an insolvent, of whose estate the defendants were creditors.

The defendants, on the same day, in answer telegraphed the plaintiffs' firm to represent defendants in the Bendelari matter.

On the same day the defendants wrote the attorneys that they had not intended by their telegram to authorize them to make any compromise or settlement of their claim, without first submitting the same for approval.

On the 8th of March, 1876, the attorneys wrote to the defendants that they meant to make a demand of the goods sold by the defendants to the insolvent, and then still in the custody of the collector of customs, on the ground that there was the right of stoppage *in transitu*.

On the 10th of March, 1876, the defendants wrote to the attorneys that if there was even a slight question as to their legal right to recover the goods still in bond, they would not favour making the effort.

On the 13th of March, 1876, the attorneys wrote the defendants that there was no law suit involved: that it was open to the Minister of Customs, on looking at the grounds of the demand, to order the delivery, or to order an interpleader, and that the latter course would involve a legal proceeding in the form of a special case for the opinion of the Court or a Judge.

On the 16th of March, 1876, the defendants wrote to

the attorneys, saying that the course proposed met with their approval, and, for the purpose of the contemplated proceedings, enclosed to the attorneys their statement of account against the estate of Bendelari.

On the 5th April, 1876, the attorneys mailed to the defendants two affidavits of claim to be sworn to by the defendants, with a view to the contemplated proceedings.

On the 12th of April, 1876, by letter of that date, the defendants forwarded the two affidavits to the attorneys, making certain suggestions as to opposing the application of Bendelari for a discharge, and contesting the claim of certain other creditors against the insolvent estate.

On the 19th of April, 1876, the attorneys wrote the defendants acknowledging the receipt of the letter of the 12th of April, and stating their approval of the position assumed by the defendants.

On the 20th of June, 1876, the defendants wrote to the attorneys for some information as to the progress that was being made in the proceedings taken in that behalf.

On the 22nd June, 1876, the attorneys wrote to the defendants in reply giving full information, and stating that the question of law had been argued by the plaintiff, and was standing for judgment.

On the 13th of September, 1876, the defendants wrote to the attorneys asking for information about some undecided questions as to the Bendelari estate.

On the 15th of September, 1876, the attorneys wrote to the defendants giving the information they desired, and stating that the suit against the estate for the goods had not yet been brought to termination by the delivery of the judgment of the Judges.

On the 26th of September, 1876, the attorneys wrote to the defendants that judgment had that day been delivered by the full Court in favour of the defendants, that is to say, that they were entitled to be paid in full for the goods in bond, and not delivered to Bendelari.

On the 14th of October, 1876, the attorneys wrote to the defendants that two out of three of the inspectors had

decided to appeal the case to the Court of Appeal for Ontario, and stated the probabilities as to the result of the appeal, if made.

On the 5th of February, 1877, the defendants wrote to the attorneys for information as to the result of the appeal, if any, made in the case.

On the 9th of February, 1877, the attorneys wrote to the defendants that the case had been argued in the Court of Appeal on the 15th of December, 1876, and was standing for judgment.

On the 20th of March, 1877, plaintiff wrote to the defendants, advising them of the retirement of Mr. Meek from the firm, and at the same time informing them that the Court of Appeal had reversed the decision of the Courts of Queen's Bench and Common Pleas in their favour, and that he had ventured to appeal from the decision of the Court of Appeal to that of the last resort, the Supreme Court of Canada.

On the 27th March, 1877, the defendants wrote to the plaintiff, reminding him of the contents of their letter of the 10th of March, 1876, to the effect that the title to the goods stopped *in transitu* was not to be contested, if there was even a slight question about their legal right to them, and allowed him to decide which member of the firm should continue the case.

On the 5th of July, 1877, the plaintiff wrote to defendants that the Supreme Court had upheld the decision of the Court of Appeal.

On the 9th of July, 1877, the defendants wrote to the plaintiff to furnish O'Donohue & Meek's bill of costs.

On 11th of July, 1877, plaintiff wrote that under the circumstances he was willing to accept \$400 in full of costs, although the demand was much larger.

On the 14th of July, 1877, defendants wrote to the plaintiffs to furnish details of the bill.

On the 16th of July, 1877, plaintiff wrote to defendants that the detailed account would be furnished in about two weeks.

On the 31st of July, 1877, the plaintiff by letter enclosed to the defendants a detailed bill amounting to \$851.62; but as another client was equally interested in the litigation, \$250 were taken off the bill and charged to him, leaving a balance of \$601.62, which, owing to the unfortunate result of the litigation, the plaintiff still expressed himself willing to reduce to \$400 in settlement.

On the 9th of August, 1877, the defendants wrote to the plaintiff declining to pay the amount of the bill, and asking for some modification, but still assuring the plaintiff that they did not expect gratuitous legal services.

On the 14th of August, 1877, the plaintiff wrote to the defendants, expressing his willingness, if the defendants desired it, to have the bill taxed, and then abandon one fourth of the amount for a settlement.

On the 21st August, 1877, defendants simply wrote declining to pay the large bill of costs which had been rendered to them.

The plaintiff commenced this action on the 25th January, 1878.

No objection was made as to the non-joinder of Mr. Meek, as a plaintiff.

The learned Judge found a verdict for the plaintiff for \$614.72.

22nd May, 1878, *W. A. Foster*, obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered, on the ground that no cause of action had been shewn within the meaning of sections 48, 49, and 50, of the Common Law Procedure Act, as required to be shewn by the undertaking of the plaintiff on which the defendants' summons to set aside the writ and declaration was discharged.

5th June, 1878, *Ferguson*, Q. C., shewed cause.

The cause of action arose here, and a new cause arose day by day by the request, and the performance of the work: *Taylor v. Nicholls*, L. R. 1 C. P. D. 242. The first letter of the plaintiff was not a contract, but a mere offer

by him to act for defendants, and the reply was not a conclusive contract.

Foster, contra. Plaintiff must shew a contract and breach, or a breach, in Ontario: *McGiverin v. James et al.*, 33 U. C. R. 212; R. S. O., p. 619; *Story's Confl. L. sec. 532*. The contract was made in New York: *Story*, on Promissory Notes, 166, note 1; *Arnott v. Redfern*, 2 C. & P. 88. In the absence of agreement, payment is to be made where the contract is entered into. The place of payment is a matter of interpretation: *Westlake*, secs. 190, 208. If there was an ever continuing request, the implication of the promise to pay was in New York. The request was from New York: *Chapman v. Robertson*, 6 Paige 627. Where no place is mentioned, the place of payment is where the contract was made: *Story's* on Confl. L. secs. 293, 297; *Noxen et al. v. Holmes et al.*, 24 C. P. 541. Plaintiff must shew a complete cause of action: *Borthwick v. Walton*, 15 C. B. 502. There is no distinction between an attorney's contract and that of another. Reference was also made to R. S. O., vol. i., p. 619, secs. 48, 49, 50, 51.

June 29, 1878. HARRISON, C. J.—The English C. L. P. Act, 15 & 16 Vic. ch. 76, in section 18, made provision for the suing in England of British subjects residing out of the jurisdiction of the Courts; but this could only be enforced upon a Court or a Judge being satisfied by affidavit, among other things, “that there is *a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction.*”

Section 19 of the same Act made provision for the suing of persons residing out of the jurisdiction of the Court, and not being British subjects, “and, by leave of the Court or a Judge, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon.”

The words in italics have caused great differences of judicial opinion as to their meaning. Not only the three Superior Courts of common law in England differed as to

their meaning, but sometimes the Judges of the same Court differed as among themselves.

These words, without alteration or modification, found their way into our C. L. P. Act of 1856, 19 Vic. ch. 43, secs. 35, 36, our C. L. P. Act of 1859, Consol. Stat. U. C. cap. 22, secs. 44, 45, and into the existing C. L. P. Act, Revised Statutes of Ontario, ch. 50, secs. 49 and 50.

In endeavoring to give a correct interpretation to these vexed words, it is better not to rely upon cases decided under the English County Courts' Acts. See *Newcomb v. De Roos*, 2 E. & E. 271; *Gold v. Turner*, L. R. 10 C. P. 149; *Taylor v. Nicholls*, 1 C. P. Div. 242; or our own Division Courts Act. See *Noxen v. Holmes et al*, 24 C. P. 541, where the words used, although somewhat similar, are not identical, and therefore susceptible of a different interpretation.

Where foreigners are attempted to be made amenable to English or Canadian law, of which they know nothing, and to the jurisdiction of the Courts of a country in which they have never resided, and are liable to be served in their own country with notice that English or Canadian process has been issued requiring them to enter an appearance, before the Courts allow proceedings to be taken against them, the Court ought to be satisfied that the Legislature intended that the Statute should apply to the particular case. See per Pollock, C. B., in *Sichel v. Borch*, 2 H. & C. 954.

Since 1866, if not earlier, in England, it has been usual, on plaintiff giving a written undertaking to prove that a cause of action has arisen within the jurisdiction of the Court against the defendants, to discharge a summons to set aside the writ and declaration on the ground that the cause of action did not so arise, and on breach of such undertaking to enter a nonsuit. See *Diamond v. Sutton*, L. R. 1 Ex. 130.

This was the procedure adopted in the present case, and we are now, on a motion for a nonsuit, called upon to decide whether or not there has been a breach of the plaintiff's undertaking.

In *Fife v. Round*, 6 W. R. 282, decided in 1858, the Court of Exchequer, consisting of Pollock, C. B., Martin, B., and Cresswell, B., held that the words, "cause of action arose," as used in the Act, did not mean the whole cause of action, but were satisfied by proof of the breach within the jurisdiction of the Court, although the contract was made abroad.

Mr. Justice Williams, in 1862, after great consideration, came to a similar conclusion. See *Slade v. Noel*, 4 F. & F. 424, 427.

But the Court of Exchequer, in 1864, consisting of Pollock, C. B., Martin, B., and Piggott, B., also after great consideration, but not having either of the foregoing cases cited to them, and apparently acting in ignorance of them, came to a different conclusion, and held that unless both the contract and the breach were proved to have taken place within the jurisdiction of the Court, the section was inapplicable.

In *Horwood v. Wood et al.*, 17 C. B. N. S. 749, decided in 1864, and *Chapman v. Cottrell*, 3 H. & C. 865, decided in 1865, the Courts held that both the contract and the breach were proved to have taken place within the jurisdiction of the Court, so that they are no aids to our present enquiry.

The Court of Queen's Bench, in 1868, held that *Sichel v. Borch*, 2 H. & C. 954, was rightly decided, and that it was not enough to shew a contract made abroad and a breach within the jurisdiction of the Court: *Allhusen v. Malgarego*, L. R. 3 Q. B. 340.

But in 1870 the Court of Common Pleas, with *Fife v. Round*, *Sichel v. Borch*, and *Allhusen v. Malgarego*, before them, deliberately followed *Fife v. Round*, and, refusing to follow *Sichel v. Borch*, and *Allhusen v. Malgarego*, held that it was enough to shew a breach committed within the jurisdiction of the Court: *Jackson v. Spittal*, L. R. 5 C. P. 542.

The Court of Exchequer, in 1870, again had the troublesome question presented for their consideration in *Durham*

v Spence, L. R. 6 Ex. 46. The defendant made a promise of marriage to the plaintiff while both parties were residing abroad. Both afterwards went to England. The defendant there wrote a letter to the plaintiff renouncing the contract, and afterwards left the country. The plaintiff, notwithstanding, caused a writ to be served upon him. The defendant moved to set aside the writ on the ground that there was no cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction. The Court then consisted of Kelly, C. B., Martin, Piggott, and Cleasby, B. B. The majority of the Court held that the writ was rightly issued. The Chief Baron was of a different opinion.

The Court of Queen's Bench, in 1872, in a very similar case to the last, adhering to their former decision in *Allhusen v. Malgerego*, L. R. 3 Q. B. 340, held that the section is inapplicable unless both the contract and the breach be proved to have taken place within the jurisdiction of the Court: *Cherry v. Thompson*, L. R. 7 Q. B. 573.

The plaintiff and the defendant in that case, both living in Germany, became engaged to marry. The plaintiff came to England, and there received a letter written and posted by the defendant in Germany, in which she declined to carry out the engagement. The Court, holding that the words "cause of action" meant the whole cause of action, dissented from *Jackson v. Spittal*,

It is only right, however, to mention that in this case the Court appeared to think that both the contract and the breach were abroad.

None of the English cases go so far as to hold that mere performance of the contract, where the contract and breach are both abroad, is sufficient to give the Court jurisdiction.

The foregoing was the state of the authorities in England when the troublesome question for the first time presented itself for the decision of this Court in *McGiverin v. James*, 33 U. C. R. 203, decided in 1873.

The Court, then consisting of Richards, C. J., Morrison, J., and Wilson, J., held, in supposed conformity to *Cherry v.*

Thompson et al., that where the contract was made in this country, and the breach abroad, the writ might be properly issued in this country. But this decision, when the section is closely examined, really does not touch the point which caused so much controversy in England. The words of the section are, upon being satisfied "that there is a cause of action which arose in Upper Canada, or in respect of the breach of a contract made *therein*." The latter alternative of the section has uniformly been read as meaning that where the contract is made within the jurisdiction of the Court, there is jurisdiction regardless of the place of the breach made; so *McGiverin v. James* comes under this alternative. The controversy in England has always been as to the meaning of the words used in the first alternative of the sentence, "*cause of action which arose*," &c., as to whether, when there is a contract abroad, and breach only within the jurisdiction of the Court, there is jurisdiction over the person, and *McGiverin v. James* is no actual decision on this point either one way or the other.

The result is that, so far as the Courts in this Province are concerned, they are not committed either to one side or the other of the question, which in England has been discussed with so much ability and so great a divergence of judicial opinion.

In 1874, in consequence of the great conflict of decisions in England, the impossibility of taking the question to error, and the great desirability of establishing a uniform practice, there was a conference of all the Common Law Judges held, and Coleridge, C. J., announced, "that the majority of the Judges were in favour of following the decision of the Court of Common Pleas in *Jackson v. Spittal*, that the Judges of the Court of Queen's Bench, though still remaining of the same opinion as before, had, for the sake of conformity, agreed to be bound by the opinion of the majority, and that, consequently, in future all the Courts would act upon the decision in *Jackson v. Spittal*." See *Vaughan v. Weldon*, L. R. 10 C. P. 47.

The general belief at the time was, that the Judges of

the Court of Queen's Bench were unanimously on one side of the question, and the Judges of the Court of Common Pleas unanimously on the other side of the question, and the Court of Exchequer divided, but presenting a narrow majority in favour of the decision of the Common Pleas.

The decision of *Jackson v. Spittal*, L. R. 5 C. P. 542, appears to commend itself to our acceptance rather than the decisions opposed to it; but, independently of this consideration, we think it better to follow that case, as being a correct exposition of the law, as was done by the Judges, in *Vaughan v. Weldon*, L. R. 10 C. P. 47.

We, therefore, decide that the words used in our statute, "Upon the Court or Judge being satisfied that there is a cause of action which arose in Upper Canada, or in respect of the breach of a contract made therein," that the words "cause of action" do not mean the whole cause of action, *i. e.*, contract and breach, but the breach alone—in other words, the act or default on the part of the defendant which gives the plaintiff his cause of complaint.

It is now necessary for us to decide whether the present case comes under either branch of the section thus interpreted—a breach here of a contract made abroad, or a breach abroad of a contract made here.

The plaintiff is suing defendants in respect of an executed contract. Where was the contract, if any, made, and where was it broken? The answer to these questions will enable us to determine the case.

"Where the parties do not both reside in the place where the contract is made, and it is effected by means of agents or clerks, the place in which the final assent is given by the party to whom the proposition is made, is that in which the contract is considered to have been made. * * * Thus, if a merchant at Genoa by letter, or by his agent, offer his goods to a person at Venice for a certain price, and the latter agrees to purchase them at such price, the contract or sale is said to have been made at Venice. * * * The vendor is, by means of his clerk or agent, deemed to be present at Venice, and the sale concluded there. If,

however, the merchant at Venice had refused to take the goods at the price demanded by the merchant at Genoa, but had made an offer to take them at a lower price, and the merchant at Genoa had accepted that offer, then the contract of sale would be deemed to have been concluded at Genoa."

This, excluding some Latin phrases, is the law as laid down in 3 *Burge's Colonial Law*, 752.

It was adopted and practically applied by this Court in *McGiverin v. James et al.*, 33 U. C. R. 210. In that case the agent, residing at Montreal, of the defendants, who resided in Liverpool, telegraphed and wrote to the plaintiffs at Hamilton, soliciting orders for boiler plate to be filled by defendants, specifying the quality and terms, to be delivered F. O. B. at Liverpool. Plaintiff wrote, on receipt, to the Montreal agent, enclosing an order for 170 boiler plates, to which the agent answered next day that the order would go forward by the next mail; and it was held that the letters and telegrams constituted a contract made in Montreal, where the plaintiffs resided.

Richards, C. J., said, at p. 211: "If the defendants had come in their own proper persons to Hamilton, and had there agreed in writing to deliver to plaintiff 500 tons of bar iron, F. O. B., at Liverpool, at a certain price per ton, and that agreement had been there signed by the plaintiff, there can be no doubt that contract would have been made in the Province of Ontario. Then what difference in principle is there between a merchant offering, by a letter delivered to me at Hamilton by the postmaster, to deliver to me the same quantity of iron on the same terms, if I would deliver my acceptance of the offer to the postmaster at Hamilton within a reasonable time, and so did deliver my acceptance of the offer? As far as I am concerned, the offer is made to me in Hamilton, and I accept it there. If I make an offer which he accepts, then the position is changed, and I in fact seek him and his domicile to deal with him, and he deals with me there."

This view is not quite in harmony with the opinion of

the Court of Queen's Bench in *Cherry v. Thompson*, L. R. 7 Q. B. 579, where the refusal to marry was by letter from Germany to the plaintiff in England, and the Court said, "In this case the receipt of the letter by the plaintiff in England furnished him with evidence that the defendant had in Germany renounced that relation"; but we prefer to follow the decision in our own Court on this point.

In *Pattison et al. v. Mills et al.*, 1 Dow & Clark 342, 363, Lord Lyndhurst said, "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made it." See further *Story's Conf. L.* 285.

If the contract here was actually made by means of the correspondence in New York, it matters not, so far as the present enquiry is concerned, where the performance of the services under that contract took place.

This point was considered in *Arnott v. Redfern et al.*, 2 C. & P. 88. There the contract was made by letters between the parties, both being at the time in London, but was for services to be performed by the plaintiff in Scotland, as an agent for the sale of the defendants' goods, and it was held that the place for the performance of the service did not control or affect the inference that the contract was made in London. Best, C. J., said: "This is the case of a Scotchman who comes into England to make a contract. As the contract was made in England, although to be executed in Scotland, I think that it ought to be regulated according to the rules of the English law."

It was argued for the plaintiff here that there was a request from New York to the plaintiff to act as an attorney for the defendants, and that until that request was assented to by the plaintiff and his partner, there was no contract, and as that assent was here, and the work done here, it must be held that the contract was made here.

It does not appear to me that this is a correct way of putting the case. The defendants did not, in any manner, seek the plaintiff at his domicile and there request him to act for them. The first offer or communication was from

the plaintiff in Canada to the defendants in New York. It was by a telegram addressed to the defendants in New York. It was the same, in effect, according to the preponderance of authority, as if the plaintiff had himself left his domicile and gone to New York to see the defendants at the place of their domicile to make the communication. Then, what was the communication? It was an offer by the plaintiff of his services as an attorney in a particular matter in which they were concerned, and which demanded immediate attention in Canada. Was this offer so made accepted by the defendants at the place of their domicile? It certainly was. From and after the moment their answer was despatched by telegram, or sent by letter at New York, there was a complete acceptance of the offer. See *Adams v. Lindsell*, 1 B. & Al. 681; *Duncan v. Topham*, 8 C. B. 225; *Dunlop v. Higgins*, 1 H. L. C. 381; *Thorne v. Barwick*, 16 C. P. 369. The offer made was made in New York, and was accepted in New York. The effect was, that the plaintiff was retained in New York to act as an attorney for the defendants, in the matters in respect of which he is now suing them.

The circumstance that the services for which the plaintiff was retained were to be performed in Canada, where the plaintiff resided, cannot, in my opinion, make any difference. The contract is one thing, the performance another and a different thing. See *Arnott v. Redfern*, 2 C. & P. 88. The contract for services may be made in one place, and the performance of the services be in another place.

The contract disclosed by the correspondence in this case was, in my opinion, one made in New York, without the jurisdiction of the Court, and, therefore, the case does not fall under the second expressed alternative of the section.

Now can it be said that the breach of that contract was elsewhere than where the contract was made? The plaintiff, after demand, delivered his bill of costs by letter addressed to the defendants in New York. This was the same as if he had himself personally delivered it to

them there, or sent an agent for the purpose. The Post Master General, to whom the letter was delivered here, was his agent for that purpose. Then what was the answer to that communication? It was a refusal to pay, made in New York, by a letter addressed to the plaintiff in Toronto. The plaintiff offered to accept \$400 in settlement by letter, also addressed to New York. The defendants in New York, by letter addressed to the plaintiff, also refused this offer. This offer was also, according to *McGiverin v. Smith et al.*, refused in New York, the place where the contract was made: See *Westlake's International Laws*, sec. 190.

It appears to me, after the best consideration which I have been able to give to the case, that not only was the contract made abroad, but that the breach also occurred abroad.

I have come to the conclusion that the rule must be made absolute to enter a nonsuit.

ARMOUR, J., although not entirely free from doubt, concurred.

Rule absolute to enter nonsuit.

WILSON V. RICHARDSON.

Reference by consent—Time for moving against.

An award made under sec. 160 Con. Stat. U. C. ch. 22, before Trinity Term, must be moved against within the first four days of that term, even though the full Court may not sit, as the motion can be made to a single Judge within the same period.

Held, also, that the reference in this case could not be treated by defendant as compulsory, being expressed to be by consent in the order of reference which on his motion had been made a rule of Court; and that if not by consent, he should first have had the order amended.

ACTION on the common *indebitatus* counts.

The first set of counts alleged a debt due to the plaintiff, and the second, a debt due to the plaintiff as assignee of Henry Cowan.

The writ of summons was issued on the 22nd of April, 1875, and after issue joined the record was entered for trial before Burton, J. A., who, at the trial on the 25th of October, 1875, directed a reference of the cause to Miles O'Reilly, Esq., C. C.

The order of reference, afterwards made a rule of Court, was expressed to be by consent of parties.

Mr. O'Reilly, for some good reason, declined to act as referee, and, on the 19th of April, 1877, by an order of that date, signed by Mr. Dalton, James Shaw Sinclair, Esq., was substituted as arbitrator for Mr. O'Reilly, and the order of reference accordingly amended.

On the 2nd of June, 1877, Mr. Sinclair made his award in favour of the plaintiff for a balance of \$207.05.

The order of reference was on the 5th day of Michaelmas Term made a rule of this Court.

On the same day *Osler*, Q. C., obtained from the Judge sitting for the full Court a rule nisi calling upon the plaintiff to shew cause why the award should not be set aside, or referred back to the arbitrator, on the ground that the arbitrator proceeded on an erroneous view of the law; or why the award should not be sent back to the arbitrator, pursuant to the provisions of 39 Vic. cap. 28, as amended by 40 Vic. c. 8, s. 20, with a direction to disallow certain specified items; or why, under the like statutes, the award should not be amended.

The rule was, by direction of the Chief Justice of the Court of Common Pleas, referred to the full Court for judgment.

Robertson, Q. C., 28th May, 1878, shewed cause.

There is no appeal. Under ch. 22, sec. 160, Consol. Stat. U. C., the award may be moved against within the first four days of the Term next after the making thereof. Here the award was made before Trinity Term, but was not moved against until the 5th day of the following Michaelmas Term: *Tanner v. Sewery*, 27 C. P. 53; *Nagle v. Latour*, 27 C. P. 137. 39 Vic., ch. 28, sec. 5, 40 Vic. ch. 8, sec. 20, do not apply, as they were passed after the reference. He referred to *Kimbray v. Draper*, L. R. 3 Q. B. 160; *Wright v. Hale*, 6 H. & N. 227. There is a new right of appeal here, for under the Ontario Statute the party may go to the Court of Appeal as to the merits. The rule was moved a day too late.

Osler, Q. C., contra. Sec. 160 Consol. Stat. U. C., ch. 22 says four days, sec. 165 six days.

This is a compulsory reference, for though there was a consent as to the terms, the reference itself was compulsory. It was in effect a reference after the new Acts came into force, the arbitrator was not seized of the case until after the Acts. When the order is made under sec. 160, 40 Vic. ch. 8, sec. 20, says the appeal shall lie against the award in the same way as if made under sec. 158. This is a mere matter of procedure, it is not a verdict, and so does not come under sec. 160.

June 29th, 1878. HARRISON, C. J.—One of the points argued before us is, whether the motion for a *rule nisi* to set aside the award not having been made till the fifth day of Michaelmas Term, was made in sufficient time.

The Act which was in force when the writ was served and reference made was Consol. Stat. U. C. cap. 22.

Section 160 of that Act provides that "In all actions involving the investigation of long accounts on either side

the Judge may, at and during the trial, direct a reference of all issues of fact in the cause," and if the parties agree upon the arbitrators (not more than three) the names of those agreed on shall be inserted in the order of reference; but if the parties cannot agree, the Judge shall name the arbitrator or arbitrators, and appoint all other terms and conditions of the reference to be inserted in such order, and the award may be moved against as in ordinary cases within the first four days of the Term *next after the making thereof*."

The Term next after the making of this award was Trinity Term, and there is no excuse offered for not moving against the award during that Term.

The fact that the full Court did not sit during that term is no excuse: *In re Moyle and City of Kingston*. (a)

The application might have been made to a single Judge, sitting for the Court, at any time during the first four days of that Term.

The Terms of the Common Law Courts were, at the time of the making of the award, defined by 29 & 30 Vic. c. 40, s. 2, as amended by 36 Vic. c. 8, s. 53, Rev. Stat. Ont. c. 39, s. 11.

Trinity Term, under the operation of these statutes, begins on the first Monday after the twenty-first day of August, and ends on Saturday of the following week.

Power is conferred on the Judges to shorten or prolong the duration of the Terms according to the exigencies of business to be transacted in the Courts: section 12 of Revised Statutes, Ont., ch. 39.

So, where in the opinion of the Judges of either of the Courts it is not necessary for the despatch of business pending in such Court "to hold sittings" during Trinity Term in any year, power is given to the Judges of such Court to direct that their Court "shall not sit during the time appointed" by the Act for the holding of Trinity Term.

This Court, in Easter Term, 1877, availed itself of the provisions of the statute, and by rule made a direction as to Trinity Term, 1877, such as the statute contemplates.

The effect of the rule, when made under the statute, is not to abolish the Term, but simply to relieve the Judges from sitting *in banc* during the term : see *In re Governors of the College of Christ, Brecknock and Martin*, L. R. 3 Q. B. Div. 16.

Conceding, for the sake of argument, that it was sufficient under the circumstances to have made the application during Michaelmas Term, it is clear that an application on the fifth day of that Term is not sufficient under section 160 of the Act, and ought not to be entertained.

We do not agree in the contention that the reference in this case was one coming under s. 165 of the Statute, applicable to compulsory references only, and which, in the case of such references, allows an application to set aside the award "to be made within the first six days of the Term next following the publication of the award to the parties."

The order of reference has been made a rule of Court by the defendant. Throughout it is expressed as being a reference by consent, or voluntary reference. If this was not the true character of the reference, the defendant, instead of making the order a rule of Court, should have had the order amended, and as amended made a rule of Court.

We cannot, on his application, hold the reference to be otherwise than voluntary. If we were to do so, we should be receiving and acting upon evidence contradictory to the writing which, by the defendant himself, has been made a rule of Court.

So far as we can judge, from the materials before us, the reference was made under and pursuant to sec. 160 of C. L. P. Act, and not otherwise.

This conclusion makes it unnecessary to decide some other questions argued before us in this cause.

ARMOUR, J., concurred.

Rule discharged, with costs.

REGINA V. SMITH ET AL.

Forcible entry—Restitution.

Defendants, employees of the Great Western Railway Co., in obedience to orders from the company, went upon the land in question, then in possession of the Stratford and Huron Railway Co., and occupied by its employees. No actual force was used, but the latter had good reason to apprehend that sufficient force would be used to compel them to leave, and they left accordingly.

Held, that this was a forcible entry within the Statutes relating thereto.

The Judge at the trial having granted a writ of Restitution: *Held*, that such writ is in the discretion of the presiding Judge, which had been properly exercised here.

Held, also, (1) that under the special facts and documents set out below, the Stratford and Huron Railway Co. had power to acquire the land in question, and accept a deed thereof. (2.) That the deed in question operated as a grant of the land, and not merely as a grant of a right of way over it. (3.) That the defendants were rightly convicted on the first count of the indictment.

Quære, whether the Great Western Railway Co. had any legal right to enter on the land for the purpose of building a switch, or for any other purpose, as against the Stratford and Lake Huron Railway Co., whose deed of the land was first registered.

THIS was a case reserved at the last Spring Assizes for the County of Perth, held at Stratford by Burton, J. A., for the opinion of this Court.

The 1st count of the indictment charged that the Stratford and Huron Railway Company, being seised in fee of the *locus in quo* (describing it,) the defendants, on 30th March, 1878, with force and arms entered and expelled the said company and their servants therefrom, and the said company kept out of possession.

The 2nd count charged that the defendants, with others unknown, with force and arms, entered the *locus in quo*, then being in possession of the Stratford and Huron Railway Co., and expelled the latter and its servants, and kept them out of possession.

At the trial the following facts were proved :

Prior to the 30th of March, 1878, the Stratford and Huron Railway Company had taken possession of and laid a track upon the land in question, as a switch from its main line to Shield's Mills, though such track was not then on the said 30th of March, connected with the main line of the Stratford and Huron Railway Company; but a

survey of the whole switch had previously been made, and at the time of the trial the said track, as laid down on the property in question, was connected by a continuous track with the said main line.

The total length of this switch was 1,000 feet.

Some time previous to the 30th of March, the Great Western Railway Company of Canada, in whose employment the defendants were and continued till the date last aforesaid, had been constructing a switch from its main line towards the land in question, and at right angles to the track of the Stratford and Huron Railway Company, as laid down thereon, and on that date it had been constructed close up to the track of the Stratford and Huron Railway Company.

The length of the switch constructed by the said Great Western Railway Company of Canada, from its main line to the land in question, was 2,145 feet.

On the said 30th of March, William Wharton Brigden, George Cummings and Robert McGin, acting under the instructions of the Stratford and Huron Railway Company, went upon the land in question for the purpose of preventing the entry of the defendants and other employees of the Great Western Railway Company of Canada thereon, and standing there, the said William Wharton Brigden expressly forbade the defendants and other employees of the last named railway company coming upon the said lands.

At that time there were from thirty to forty men with the defendants, and the defendant William G. Smith, who was the track inspector of the Great Western Railway Company of Canada, and had charge of the other defendants and the other men, stating that he had received orders to come on the land in question, told the defendants and other men to come on the land, whereupon the defendants and others entered on the land, tore up the track of the Stratford and Huron Railway Company, and by actual, though not violent force, compelled the said William Wharton Brigden, George Cummings, and Robert McGin, to move from their position on the land in question, and laid

down the track of the Great Western Railway Company of Canada thereon, which had remained there ever since, and on which the defendants had since been working.

The defendants and other employees of the Great Western Railway Company of Canada, apparently intended, at all risks, to enter upon the land and tear up the track of the Stratford and Huron Railway Company and lay the track of the Great Western Railway Company thereon, and the said employees of the Stratford and Huron Railway Company had good reason to apprehend that, if necessary, force would be employed for that purpose, and only retired from possession when actually compelled so to do by actual force exerted by the defendants and others with them, and the immediate apprehension of further overwhelming force.

Charles Shields, the owner in fee of the land in question, executed the following instruments on the day they bore date respectively:

“This agreement made the 20th day of February, A.D. 1878,

Between James Shields and Charles Shields, of Listowell, grain merchants, of the first part, and the Stratford and Huron Railway Company, of the second part:

Witnesseth, that the said parties of the first part agree to convey and assure unto the said parties of the second part, for the sum of one dollar, the right of way from the east line of J. & J. Livingstone's property (west of said parties of the first part's mill in the town of Listowell), through all the property of the parties of the first part, to the west line of the property of J. M. & A. Climie, east of said parties of the first part's said mill, for the purpose of a siding or switch for the line of the railway of the said parties of the second part, such right of way to be a strip of land twelve feet wide.

In consideration whereof the parties of the second part agree to construct, by the 1st of June next, a siding or switch from their line of railway west of said mill, between said mill and George Tounes's tannery, and a spur from the said siding or switch, northerly, up to and along the west side of said mill as far north as the north end of said mill lot.

It is further agreed between the parties hereto, that the parties of the first part will convey title to the said right of way upon the said party of the second part making proper plan of said siding or switch, and that the said parties of the second part will draw the cars of the Great Western Railway Company upon said switch at the same arbitrary rate as the cars of the Trunk or Canada Southern Railway.

Witness the hands and seals of the said parties of the first part, and the hand of the Vice-President of the said Railway Company.

Signed, sealed, and delivered,	}	JAMES SHIELDS, [L. S.]
in presence of		CHARLES SHIELDS, [L. S.]
Witness :	}	D. TISDALE,
W. W. BRIGDEN,		Vice-President S. & H.
WM. HAMILTON,		R. W. Co. [L. S.]

"This indenture made this 25th day of February, 1878, between James Shields of the town of Listowel, in the county of Perth, miller, and Charles Shields of the same place, miller, of the one part, and the Great Western Railway Company, hereinafter called "The Great Western," of the other part.

Whereas the Great Western intend to construct a railway track from some point on the Kincardine branch of the Wellington, Grey and Bruce Railway, near Main street, in the town of Listowel, and thence across Main street and the lands of Messrs. John and James Livingstone, to and through, and across lots Nos. four and five, as such, on the west side of Victoria street, west, and park lots R and S, on the east side of Victoria street, west, owned by the said James and Charles Shields, and a spur on lot R to the mill of the said James and Charles Shields.

And whereas the said James and Charles Shields have agreed to give and grant to the Great Western the right of way for, and the right to lay the said railway track upon and across the said lots four and five, and park lots R and S, and to work and use the same for railway purposes.

Now, therefore, in consideration of the premises and of

the sum of one dollar paid by the Great Western to each of them, the said James and Charles Shields, the receipt whereof they do hereby acknowledge, they the said James and Charles Shields do, and each of them doth, grant and give to the Great Western, their successors and assigns, the right and privilege at any and all times hereafter to enter into and upon the said lots four and five, as such, on the west side of Victoria street west, in a sub-division of part of farm lot number thirty-five, formerly of the first concession of the township of Elma, now forming part of the town of Listowell, and into and upon park lots lettered R. and S. in same survey, or such part or parts thereof, and of such width not exceeding ten feet as the Chief Engineer of the Great Western may select for the purposes of the said railway, and thereupon to construct and make and maintain the said railway, and do all works necessary therefor, and at all times hereafter to occupy and use, have and enjoy the said lands so selected and taken for such purpose, for the sole and exclusive benefit and use of the Great Western, its successors and assigns, and to work and operate the said railway for railway purposes with their engines, cars, trains, and servants.

Provided, however, that if the said railway track shall not be constructed upon the said parts of lots four and five, and Park lots R. and S, on or before the first day of May next, the rights hereby granted shall cease; and provided that if at any time hereafter the Great Western shall take up and remove the said railway track and the materials thereof (as they shall have the right to do) from the said lots four and five, and Park lots R and S, the right of the Great Western to use and occupy the said land shall thereupon cease.

And the said James and Charles Shields covenant with the Great Western, that they may quietly use and occupy the said premises as and in the manner herein set forth, and they will execute any further documents necessary for the more effectually carrying out the intention of the parties hereto.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

Signed, sealed, and delivered, }
 in presence of } JAMES SHIELDS. [L.S.]
 RICHARD SKILL. } CHARLES SHIELDS. [L.S.]”

Which said instrument was registered in the Registry Office for the North Riding of the county of Perth, on the 10th day of April, A.D. 1878.

“ Know all men by these presents, that I, Charles Shields, of the town of Listowel, in the county of Perth, miller, in consideration of one dollar, paid to me by the Stratford and Huron Railway Company, the receipt whereof is hereby acknowledged, do grant and convey, and I, Shields, of the same place, wife of the said Charles Shields, do bar my dower in, all that certain parcel of land, situate in the town of Listowel aforesaid, being composed of part of lot number thirty-four (34) in the first concession of the township of Elma, now in the said town of Listowel, which may be known and described as follows: commencing at a point on the west boundary of lot number thirteen on the west side of and adjacent to Victoria street, in the said town of Listowel, distant eight feet from the north-west corner thereof, and running easterly on a curve of four hundred and forty-one feet radius through lots numbers twelve, eleven and ten, on the west side of, and adjacent to said Victoria street, two hundred and twenty-one feet, to a point on the east boundary of said lot number ten, distant nineteen feet from the north-east corner thereof; thence running southerly along said east boundary of said lot number ten, eighteen feet to a point; thence running westerly two hundred and twenty-six feet, on said curve of four hundred and forty-one feet radius, to a point on the west boundary of said lot number thirteen, thence running northerly twelve feet to the place of beginning, as shewn in annexed sketch or plan, containing six hundredths of an acre, more or less; also a part or portion of lot thirty-five in the said concession of the township of Elma, now

in the town of Listowel, and being a strip of land twelve feet wide across part of lot "R," said lot R lying on the east side of, and adjacent to Victoria street, which slip of land may be better known and described as follows: commencing at a point on the line between the lands of one George Turner and the said Charles Shields, distant ninety-eight feet from the east boundary of said lot R, and running easterly, on a curve of nine hundred and fifty-five feet radius, one hundred and eighteen feet, to a point on the said east boundary of said lot R, distant sixty-six feet from the said line between the lands of said Turner and Shields; thence running southerly along said east boundary of lot R fifteen feet, thence westerly ninety-five feet, on said curve of nine hundred and fifty-five feet radius, to a point on said line between the lands of said Turner and Shields; thence westerly eighteen feet to the place of beginning; containing twenty-five thousandths of an acre, more or less; also a strip of land, twelve feet wide, through lot "S," said lot S lying east of and adjacent to above mentioned lot "R," being part of farm lot number thirty-five aforesaid, which said strip of land may be known and described as follows: commencing at a point on the line between said lots S and R, distant sixty-six feet northerly from the said line between the lands of said Turner and Shields, and running easterly two hundred and eighty-one feet on a course that intersects the east boundary of said lot S, at a point distant fifty-three feet from the north-east corner thereof; thence southerly fifteen feet along said east boundary of said lot S, thence westerly, parallel to and twelve feet from said easterly course, to a point on the west boundary of said lot; then northerly, along said west boundary, fifteen feet to the place of beginning, as shewn on a plan annexed, containing seventy-seven thousandths of an acre, more or less; also a strip of land, twelve feet wide, through said lot R, commencing at a point where the line between the lands of Turner and Shields aforesaid intersects the east boundary of Victoria street, and running northerly on a course of three hundred and eighty-two

feet radius, to a point opposite the centre of the grist mill, the property of said Charles Shields, situate upon said lot R, distant from the said east boundary of Victoria street, to the centre of said strip of land, eight feet, thence northerly, parallel to the said Victoria street, to the northerly boundary of said lot R, as shewn on a plan annexed, containing seventy-three thousandths of an acre, more or less.

Freed and discharged of and from all liabilities, whether statutory or otherwise, to construct and maintain, or to contribute towards the construction and maintenance of any line of railway fence separating and dividing the lands and premises hereby conveyed to the said Railway Company, from any lands adjacent thereto.

The herein described land conveyed for the purpose of a siding from the Stratford and Huron Railway: if at any time after the siding is built, the ties and rails should be removed, the land will revert to the original owner, his heirs and assigns.

The same having been selected and laid out by the said company for the purpose of their railway, to hold with the appurtenances unto the said Stratford and Huron Railway Company, and their successors and assigns, provided always, and it is hereby expressly understood and agreed by and between the parties hereto, that the said Railway Company shall not be called upon to construct or defray the expenses of constructing any fence upon the line or limit of the lands and premises hereby conveyed, or intended so to be, or to contribute towards the same.

As witness our hands and seals this 26th day of February, 1878.

Signed, sealed, and delivered, }
 in presence of } CHARLES SHIELDS. [L. S.]"
 A. D. WRIGHT. }

Which said instrument was registered in the Registry Office for the North Riding of the county of Perth, on the 2nd day of April, A.D. 1878.

It was not shewn at the trial that the Great Western Railway Company of Canada had obtained the sanction of the Governor in Council, for the construction of its said switch.

At the said trial, counsel for the Crown moved for a writ of restitution of possession to the Stratford and Huron Railway, which was granted, but was directed not to issue until after the decision of the points reserved in this case.

The jury were directed that it was not necessary, in order to constitute the entry by the defendants a forcible entry, that they should have used either violence or threats, but if they were satisfied that the employees of the Stratford and Huron Railway Company apprehended that force would be used to obtain possession, in the event of their refusal to yield it, that would, in law, constitute a forcible entry, and it was for them to say whether, from the facts disclosed, they believed the said employees did give up possession in consequence of such apprehension.

Counsel for the defendants objected that it was a mere trespass, and also took several other objections embraced in the following questions reserved for the opinion of the Court:

First. Whether such ruling and direction were correct in law.

Secondly. Whether the Stratford and Huron Railway Company had power to acquire the land in question, and to accept the deed of the 26th day of February, 1878, above set out, inasmuch as the track of its switch at the land in question was not then connected by a continuous track with its main line, and it was not shewn that the intermediate land between it and the main line had been acquired.

Thirdly. Whether, upon the facts and the instruments above set out, the Stratford and Huron Railway Company acquired more than a right of way or easement over the land in question, to which the statutes relating to forcible entries did not apply.

Fourthly. Whether, assuming that the Great Western Railway Company of Canada were otherwise entitled in law to the land in question, its employees, acting under its direction, could lawfully enter upon the said land, with the intent and for the purpose of constructing a switch thereon, without the previous sanction of the Governor in Council.

Fifthly. Whether, upon the facts set out, and the points

of law above reserved, the defendants were properly convicted on both or either counts of the said indictment, and if only on one count, on which count they were properly convicted: the conviction to be quashed or sustained, either as regards both counts, or either count of the indictment, as the Court might direct.

Sixthly. Whether the writ of restitution was properly awarded.

M. C. Cameron, Q. C., for the defendants. The defendants, acting for the Great Western Railway, used no more force than the act of entering with a determination to lay the track was force. There was no violent force, nor opposition to call for violent force, so as to bring the defendants within the Act against forcible entry. The Stratford and Huron Railway had not power under their consolidated Act, 36 Vic. ch. 87, to take compulsorily land for this switch or spur; and their only right was under the agreement with Shields, and sec. 128, ch. 66, Consol. Stat. C.; and under the deeds the Great Western had the stronger claim, and were acting under the powers by Consol. Stat. Can. ch. 66, sec. 9, sub-sec. 15, and sec. 130, conferred on railway companies. The defendants, therefore, acting in furtherance of a statutory right, could not be answerable for a forcible entry. The Stratford Railway Company had at best only an easement—namely, a right to cross the land; and there can be no forcible entry upon a mere easement: see *Russell on Crimes*, 5th ed., 408; and there can be no writ of restitution awarded.

R. Smith, contra. The statement of seisin need not be proved, but the seisin must be stated, if it is intended to claim a writ of restitution: Hawk, P. C., I., ch. 64 sec. 32; Arch. Cr. Pr., 17th ed., 849; *Rex v. Dillon*, 2 Ch. 314; *Newton v. Harlands*, 1 M. & G. 956. Seisin was shewn in the Stratford and Huron Railway Company by proving possession. There was some force and apprehension of violence, and this was a forcible entry. Is this an easement or an estate? "Right of way," as spoken of in

the case of a railway, means right to the land itself. The words, "to have, occupy, and enjoy the land," create an estate of freehold. "*Id certum est quod certum reddi potest*;" but as an immediate estate of freehold cannot commence in *futuro*, the Great Western Railway Company have simply "an agreement to convey." The deed to the Stratford and Huron Railway Company conveys by metes and bounds by the words "do grant and convey." The Great Western Railway Company had no legal power to build the switch before obtaining the consent of the Governor in Council.: 38 Vic. ch. 24. D. The Stratford and Huron Railway Company had under 40 Vic. ch. 79, sec. 28, O.

June 29, 1878. HARRISON, C. J.—The first question is as to the direction of the learned Judge at the trial.

He told the jury that it was not necessary, in order to constitute a forcible entry by the defendants, that they should have used either violence or threats, but if the jury were satisfied the employees of the Stratford and Huron Railway Company apprehended that force would be used to obtain possession, in the event of their refusal to yield, it would, in law, constitute a forcible entry.

The case shews that on the day in question several employees of the Stratford and Huron Railway Company went upon the land for the purpose of preventing the entry of the employees of the Great Western Railway Company, and while upon the land expressly forbade such entry, but the employees of the Great Western Railway Company, numbering from thirty to forty men, notwithstanding, went upon the land and tore up the track of the Stratford and Lake Huron Railway Company, and by actual, although not violent force, compelled the employees of the Stratford and Lake Huron Railway Company to remove from the land, and laid down the track of the Great Western Railway Company across the piece of land in dispute. The employees of the Great Western Railway Company apparently intended, at all risks, to enter upon the land, take up the track of the Stratford and Lake Huron Railway Company, and lay the track of the Great Western

Railway Company, and the former had good reason to apprehend that, if necessary, force would be employed for that purpose, and only retired under that apprehension.

An entry which has no other force than such as is implied by the law in every trespass, is not within the Statutes as to forcible entry: *Hawkins*, P.C. Vol. I, cap. 28, sec. 25. There must be proof of such force, or at least such shew of force as is calculated to prevent any resistance: *Rex v. Smyth et al.*, 5 C. & P. 201.

It seems to be agreed that an entry may be said to be forcible not only in respect of a violence actually done to the person of a man, as by beating him, or if he refuse to relinquish his possession, but also in respect of any other kind of violence in the manner of entry, as by breaking open the doors of a house, and perhaps by any act of outrage after the entry, as by carrying away the party's goods: See *Hawkins*, P. C. 1, cap. 28, sec. 26.

Wherever a man, either by his behaviour or speech at the time of entry, gives those who are in possession of the tenements which he claims just cause to fear that he will do them some bodily hurt if they will not give way to him, his entry is esteemed forcible, whether he cause such a terror by carrying with him such an unlawful number of servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance; as, if one say that he will keep his possession in spite of all men, &c. See *Ib.* sec. 27.

To constitute a forcible entry, it is only necessary that the entry should be with such numbers of persons and show of force as is calculated to deter the rightful owner from sending the persons away and resuming his own possession: *Milner et al. v. Maclean et al.*, 2 C. & P. 17

If the actual possession of another be taken and held under circumstances which shew that it will not be sur-

rendered without a breach of the peace, it is a forcible entry: *Childrest v. Black*, 9 Yerg. 317.

Sir James Fitzjames Stephens, in his Digest of Criminal Law, at p. 51, says: "Everyone commits the misdemeanor called a forcible entry, who, in order to take possession thereof, enters upon any lands or tenements in a violent manner, whether such violence consists in actual violence applied to any other person, or in threats, or in breaking open any house, or in collecting together an unusual number of persons for the purpose of making such entry."

The entry here was by a number of persons, numbering from thirty to forty. Such a force, or show of force, was not necessary for a peaceable entry. Resistance was offered so long as it appeared there was any hope of peaceable resistance. Those resisting had good reason to apprehend violence in the event of further resistance, and yielded possession in the apprehension of such violence. The entry, under these circumstances, must, we think, be deemed a forcible one within the meaning of the statutes. and so we agree with the learned Judge in his direction to the jury, and answer the first question in the affirmative.

The second question is as to the power of the Stratford and Lake Huron R. W. Co. to acquire the land in dispute. The land was acquired for the purpose of constructing thereon a branch line. The branch intended was less than a quarter of a mile in length. It was being constructed for the purpose of connecting Shields's mills with the main line of the railway company. The company, under sec. 28 of 40 Vic. cap. 79, Ont., has express power to build a branch for such a purpose, and the power to construct the branch would involve the power to acquire the land necessary for that purpose. Where the land necessary is voluntarily given by the owner, there is no need of the exercise of the compulsory powers under the General Railway Act, which makes necessary the filing of a plan and other similar procedure. The fact that, at the time of the entry, the land intervening between the place of the entry and the main line of the company was not shewn to have been acquired, cannot avail the defendants; nor the fact that

at that time the branch was not continuously constructed so as to be connected with the main line. It was in process of construction, and this, so far as the defendants are concerned, was a sufficient possession.

We answer the second question in the affirmative.

The third question is, as to the character of the right which the Stratford and Lake Huron Railway company acquired from the owner of the land, under the deed dated the 26th February, 1878. The deed is a conveyance to the Stratford and Lake Huron Railway Company, of a piece of land specifically described, freed and discharged of and from all liabilities, whether statutory or otherwise. The purpose is, that the land shall be used for the construction of a branch railway. The intention is, that the land so conveyed shall be fenced from the adjacent lands. The deed clearly operates as a grant of the parcel of land described, and not merely as a grant of a right of way over it.

We answer the third question in the affirmative.

The answer to this question renders unnecessary any answer to the fourth question. It is not necessary for the decision of this case to give any opinion as to the title of the Great Western Railway Company. The 5 Rich. 2, cap. 7, not only enacts "That none from henceforth make an entry on any lands and tenements, but in case where entry is given by the law," but "in such a case not with a strong hand, nor with a multitude of people, but only in a peaceable and easy manner." It is not necessary under this statute that the indictment should shew who had the freehold at the time of the force, "because these statutes seem equally to punish all force of that kind, without any way regarding what estate the party had or when it was made; yet it seems that such indictment ought to shew that such entry was made on the possession of some person who had some estate in the tenement, either as a freeholder or lessee for years, for otherwise it doth not appear that such entry was made injurious to any one:" *Hawkins* P. C. 1, cap. 28, sec. 38.

We are of opinion that the Stratford and Huron Railway Company have shewn a sufficient estate in the land, and

that they were in possession of the land when the defendants made a forcible entry upon it, and this subjects the defendants to conviction, whether the Great Western Railway Company had a legal right to enter peaceably on the land or not. Evidence of title in defendants, or those under whom they were acting, is in such a case of no avail: see *Rex v. Williams*, 4 M. & R. 472; *Regina v. Cokely et al.*, 13 U. C. R. 521; *Regina v. Connor*, 2 Pr. R. 139.

We are not satisfied that the Great Western Railway Company had any legal right to enter on the land for the purpose of building a switch, or for any other purpose, as against the Stratford and Lake Huron Railway Company, whose deed of the land was first registered, but as the answer to such a question is unnecessary for the purpose of the present conviction, we do not express any decided opinion on the point.

The defendants were, in our opinion, rightly convicted on the first count of the indictment: *Lows v. Telford et al.*, L. R. 1 Ap. Ca. 414. The conviction on the first count must be sustained, and the conviction, as to the second count, quashed. This is our answer to the fifth question submitted for our opinion.

Every one commits the misdemeanor called a forcible detainer, who, having wrongfully entered upon any lands or tenements, detains such lands and tenements in a manner which would render an entry upon them, for the purpose of taking possession, forcible: *Stephen's Criminal Digest*, 51. The first count not only alleges a forcible entry, but a forcible detainer. The evidence, in our opinion, supports each of these allegations. It was in the discretion of the learned Judge who tried the cause either to grant or refuse restitution: *Regina v. Wightman*, 29 U. C. R. 211. He, in our opinion, rightly granted it: *Hawkins P. C.* 1, cap. 28, s. 41. This is our answer to the sixth question submitted for our opinion.

ARMOUR, J., concurred.

Conviction affirmed as to first and quashed as to second count of the indictment.

HERBERT V. THE MERCANTILE FIRE INS. CO

Fire insurance—Misrepresentation—Warranty—Adverse witness—Discretions of Judge at trial—Right to review.

To a question asked of the plaintiff, on his application for insurance, whether there was any incendiary danger either threatened or apprehended, the answer was in the negative, but the evidence shewed the contrary in both respects. The contract of insurance made the answer a warranty.

Held, that he could not recover.

The Court will not review the discretion of the Judge at the trial in receiving evidence to contradict a party's own witnesses as being adverse, nor in receiving evidence on the part of the defence after the close of the plaintiff's case, even though for the purpose of corroborating the defence.

ACTION on a policy of insurance against fire, dated 25th October, 1877, from 23rd October, 1877, to 23rd October, 1878, as follows:

1 On a brick dwelling and frame outhouses	\$300
2 On frame stable and shed	300
3 On ordinary contents thereof.....	1200
4 On frame barn.....	400
5 On ordinary contents thereof.....	500
6 On a frame barn and stable and barn	200
7 On ordinary contents thereof.....	400
8 On a frame barn	250
9 On ordinary contents thereof.....	150
10 On frame stable and shed	200
11 On log barn	50
12 On ordinary contents thereof.....	400
13 On a frame dwelling	250
	<hr/>
	\$4,600

Averment of destruction by fire, on 28th December, 1877, of items 2, 3, 4, 5, 6, and 7, whereby plaintiff sustained loss to the amount of \$2,425.

Plea: 1. Denial of policy.

2. That defendants did not agree as alleged.

3. That defendants were induced by fraud of the plaintiff to make the policy.

4. That the plaintiff by his application warranted that there was no incendiary danger threatened or apprehended.

to the insured premises : that the existence of such a circumstance was a circumstance material to the risk, and that such incendiary danger had been threatened and was apprehended at the time of the application to the knowledge of the plaintiff.

5. Same defence pleaded as a breach of the statutory conditions, and variations in conditions.

6. False and fraudulent misrepresentation and concealment of incendiary danger, contrary to the statutory conditions, and variations in conditions.

Issue on all the pleas.

The issues were tried at the last London Spring Chancery Sittings, before Proudfoot, V. C.

The application for the insurance was made and dated on 25th October, 1877. It contained 36 questions, all of which were answered in writing. The 32nd question was as follows : "Is there any incendiary danger threatened or apprehended ?" Ans. "No." The conclusion of the application was as follows : "And the said applicant hereby covenants and agrees to and with the said Company that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant, and agrees and consents that the same be held to form the basis of the liability of the said Company, and shall form a part of and be a condition of this insurance contract."

The policy was issued as of 25th October, 1877, and had endorsed upon it the "statutory conditions," with "variations in conditions," headed in red ink, as directed by the statute.

The fire took place on the morning of 28th December, 1877. and was undoubtedly caused by the act of an incendiary.

The plaintiff forwarded his proof papers on 17th January, 1878, shewing an aggregate loss of \$2264.15, and stating that the fire, so far as could be ascertained, "was caused by some evil disposed person or persons" unknown.

The plaintiff, six or seven months before insuring with

the defendants, had some trouble with a man called Dagg about some rails. The plaintiff and Dagg a year before had traded farms, and a dispute arose between them as to rails, which ended in a law suit. The suit was tried at Goderich, and resulted in favour of the plaintiff. When returning from Goderich by train some persons in the train, who were supposed to be friends of Dagg, cut the bell rope, and afterwards gave plaintiff and his son a beating.

After this, and up to the time of the insurance, the plaintiff and some of his men, called Smith and Morgan, night after night slept in his barn armed, for the purpose of protecting the barn, as he and his men swore at the trial, against tramps; but it was contended on the part of the Company that it was against incendiaries. There was evidence of their having been one night disturbed by some men who for some purpose were at the barn, but fled in the darkness when their presence was discovered.

One of the plaintiff's men, when the weather became too cold to sleep out of the dwelling house, recommended the plaintiff to insure the outbuildings, and the plaintiff afterwards did so with the defendants.

The agent of the Company at London swore that on the 4th January, 1878, immediately after the fire, and before the proof papers were sent in, the plaintiff told him the origin of the fire was incendiarism: that foot marks had been seen approaching the barn: that he had been persecuted and threatened time and again by his enemies at Lucan: that they had threatened to set the place on fire: that he lived in constant fear of his enemies burning him out, and said his enemies were the same persons who assaulted him after the Dagg trial, and that he would have to leave the country to get rid of his enemies.

While the plaintiff, when called as a witness, admitted some of this conversation, he denied that he ever said anything about his enemies threatening to set fire to his property, or of his intention to quit the country to escape them.

The inspector of the Company swore to a subsequent conversation with the plaintiff, in which he said the burn-

ing of the building was no surprise to him: that it had been done by his enemies; and that it was just what he had expected: that he had fears of being burnt out ever since his trouble commenced with Dagg, and that his barn was watched for that reason.

Plaintiff, in giving his testimony, denied that he told the inspector of his fears of being burnt out, or that he had his men sleeping in the barn under any such apprehension.

This suit was commenced on 18th March, 1878.

After the commencement of the suit the defendants sent one Hughes and the Chief Constable of Lucan to see the plaintiff's men, Smith and Morgan, and procured written statements from them.

These men, according to the written statements, said they had frequently heard plaintiff express his fears about being burnt out by his enemies: that it was to prevent the realization of his fears that they slept in the barn while the weather was mild enough to permit of their doing so; but, when called as witnesses for the defence at the trial, they denied that they ever made such statements, and assigned, as a reason for their sleeping in the outbuildings, the fear the plaintiff had of tramps stealing his grain,

The learned Vice-Chancellor was of opinion that these witnesses were adverse to the defendants, and so permitted the defendants to call Hughes and the constable to contradict them, which they did.

The plaintiff and his wife were called in reply, and swore there were no threats of burning of which they had any knowledge; and the plaintiff, in the course of his evidence, contradicted the agent and inspector of the Company, as already mentioned, and positively denied that he ever said to either of them that he would have to leave the country in order to get rid of his enemies.

The defendants then proceeded to call a witness named Lafayette Young, who was present at one of these conversations, for the purpose of corroborating the testimony given by the defendants, and, subject to objection, he was allowed to be called, and swore he was present at the con-

versation between the plaintiff and the agent of the Company, and heard plaintiff say he "thought he would have to leave the country to get rid of these parties." The evidence shewed that if defendants had known of the threats to burn plaintiff's premises they would not have accepted the risk.

The learned Vice-Chancellor came to the conclusion, upon the evidence, that the plaintiff before and after the time of making the application for insurance did apprehend danger from incendiarism, and that his representation to the contrary was wilfully false, and so he rendered a verdict for the defendants.

Bethune, Q.C., 27th May, 1878, obtained a rule calling on the defendants to shew cause why the verdict entered herein by the learned Vice-Chancellor, by whom the case was tried without a jury, should not be set aside, and a verdict entered for the plaintiff for the amount of the policy sued on, or for such other sum as the Court might think proper, or for such amount as might be found to be due, in respect of the loss, by the Master of the Court of Chancery, at London, on the ground that on the law and evidence the plaintiff was entitled to recover, and that the learned Vice-Chancellor should have found a verdict for the plaintiff; and on the ground of the improper reception of evidence, in this, that the learned Vice-Chancellor allowed the defendants to give evidence to contradict the evidence of their own witnesses, who were not adverse witnesses, and also received the evidence of Lafayette Young, in corroboration of the evidence of the defendants' witness Nattrass, after the close of the plaintiff's evidence in rebuttal.

J. K. Kerr, Q. C., shewed cause.

F. Osler, June 5, 1878, supported the rule. The learned Judge allowed the defendants to contradict their own witnesses, who were not hostile. Had it not been for the improper reception of evidence the weight of evidence was in favour of the plaintiff: *Greenough v. Eccles*, 5 C. B. N. S. 786.

There was no evidence of any incendiary danger of which the plaintiff had knowledge. The threats, if any, were after the policy issued.

June 29, 1878. HARRISON, C. J.—Lord Mansfield, in the well known case of *Carter v. Boehm*, 3 Burr. 1905; S. C., 1 Smith L. C., 7th Ed., 560, in accurate language unfolded principles of insurance law applicable here, and which have never been controverted or doubted.

He said: "Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance to his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist."

"The keeping back such a circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement."

"The policy would be avoided against the underwriter if *he* concealed, as, if he insured a ship on her voyage which he privately knew to be arrived, and an action would lie to recover the premium."

"The governing principle is applicable to all contracts and dealings."

"Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary."

"But either party may be innocently silent as to grounds open to both to exercise their judgment upon. *Aliud est celare, aliud tacere; neque enim id est celare quicquid reticeas, sed cum quod tu scias id ignorare emolumenti tui causa, velis eos quorum intersit id scire.*"

"This definition of concealment, restrained to the efficient motives and precise object of any contract, will generally hold to make it void in favour of the party misled by his ignorance of the thing concealed."

In a subsequent part of the same judgment he said, "The reason of the rule which obliges the parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of and has no reason to suspect."

"The question, therefore, must always be, whether there was, under all the circumstances, at the time the policy was underwritten, a fair representation or a concealment, fraudulent, if designed, or, though not designed, varying materially the object of the policy and changing the risk to be run."

Bayley, J., in *Lindenau v. Desborough*, 8 B. & C. 586, 592, said: "I think that in all cases of insurance, whether on ships, houses or lives, the underwriter should be informed of every material circumstance within the knowledge of the insured; and that the proper question is, whether any particular circumstance was in fact material, and not whether the party believed it to be so."

The case of *Bufe v. Turner et al.*, 6 Taunt. 338, may be selected from many similar cases as a good illustration of the foregoing principles. The plaintiff, having one of several warehouses next but one to a boat builder's shop in Heligoland, which took fire on the same evening, after the fire was apparently extinguished, gave instructions by letter, dated 11th July, 1814, for insuring that warehouse, but without apprising the underwriters of the neighbouring fire. Early on the morning of the 13th of July, a fire again broke out in the boat builder's shop, and consumed the premises insured. The jury acquitted the plaintiff of any fraud or dishonest design, the fire being apparently extinguished when he ordered the insurance, but thought the circumstance of the fire on the 11th July ought to have been communicated to the defendants, who, without the

information, did not engage on fair grounds with the plaintiff, and, under these circumstances, they gave a verdict for the defendants, and the Court refused a rule *nisi* for a new trial.

In accordance with these principles it has been held in some United States cases that incendiary threats, or attempts to set fire to the insured or neighbouring property, are material facts or circumstances which good faith demands shall be disclosed in effecting an insurance against fire.

In *The North American Fire Ins. Co. v. Throop*, 22 Michigan 167, Cooley, J., says: "It cannot be denied that an attempt to destroy by fire the property upon which an insurance is sought, is usually regarded as a circumstance of very high importance, and as one that presumptively is always material to the risk, though possibly in any particular case the insurer, if he were cognizant of all the facts, might know that the particular attempt that had been made was not likely to be repeated. Without explanation, the inference must usually be that an effort to fire the building of another indicates an evil motive which is likely to induce other attempts until the destruction is accomplished, and no prudent insurer would treat the attempt as immaterial, unless he had satisfied himself by a careful enquiry either that the motive for making it no longer existed, or that a renewal of the attempt had, for some other reason, become impracticable or unlikely. No one can question its being both proper and prudent for the insurer, in his application for policies, to treat this circumstance as material, and to require specific and truthful answers concerning it, and when he has done so, and made their truthfulness a condition of the contract, we do not think it competent to submit to a jury the question of materiality, and allow them to find, in opposition to the contract of the parties and general experience, that it is unimportant. We think a fact thus specifically enquired about, and generally of such vital importance, is to be considered as material, as a matter of law, and defendants were entitled to a charge accordingly."

One of the questions in this case was, "Incendiarism—have you any reason to believe property is in danger from it?" The answer was "no," and the affirmation was, by the terms of the policy and application, as here, made a part of the policy, and the answers therein contained warranties.

Where this is not the case, and the defence is rested upon the ground merely of concealment or misrepresentation, less strictness is required.

In *Beebee v. The Hartford County Ins. Co.*, 25 Conn. 51, where, before making the application for insurance, there had been attempts to burn down the property, and the plaintiff, when explaining these attempts to the agent, was interrupted by the agent saying fires frequently occurred, and no one could say how they occurred, and passed on to some other enquiries foreign to incendiarism, it was held that plaintiff was not bound to go further into details where the agent manifested no interest in the enquiry, and that the plaintiff could not under the circumstances be fairly charged with concealment.

In *Bunyon* on Insurance, p. 65, where these cases are mentioned, it is said, "No fire claims appear to have been disputed in this country on such grounds, which are undoubtedly within the general principle; but after the reign of terror of Swing, in the year 1830, in the agricultural districts, it became usual on the part of offices to make a distinct enquiry, or require a written statement from the insured, as to incendiary fires in his district, or threats personal to himself."

The same writer then well says, "If the non-communication of a material fact will avoid the policy, *a fortiori* a misrepresentation will do so."

A representation is said by *Marshall* on Insurance, 2nd ed., 345, quoted by *Bunyon*, p. 66, to be material, "when it communicates any fact or circumstance, the belief of which may be reasonably supposed to influence the judgment of the underwriters in undertaking the risk and calculating the premium; and, whatever may be the form of expression used by the assured or his agent in making a representation,

if it have the effect of imposing upon or misleading the underwriters, it will be material and fatal to the contract."

What amounts to a concealment or misrepresentation of a material fact is, in the absence of warranty, a question for the jury, where there is a jury, or for the judge where there is no jury: *Fitzherbert v. Mather*, 1 T. R. 12; *Huguenin v. Rayley*, 6 Taunt. 186; *Von Lindeneau v. Desborough*, 3 C. & P. 353; *Benson v. The Ottawa Agricultural Mutual Ins. Co.*, 42 U. C. R. 282.

The underwriters had, before accepting the risk, put to the plaintiff the distinct question, "Is there any incendiary danger *threatened* or *apprehended*?" To this the plaintiff answered in the negative.

It is clear, on the evidence, that if the answer had been in the affirmative the defendants would not have accepted the risk; and it is not, we think, assuming too much against the plaintiff to assume that, as a man of ordinary intelligence, he knew this would be the result of such an answer; but whether he knew it or not is in law a matter of no consequence.

The words "incendiary danger" are unfortunately too well known for any man in Lucan or its neighbourhood to profess ignorance of their meaning. If the plaintiff was ignorant of their meaning, he ought to have ascertained the meaning before answering the question. But he does not profess ignorance of their meaning. He appears fully to have understood their meaning, but represented that, so far as he was concerned, an incendiary fire was neither threatened nor apprehended. The learned Judge has found against him on the evidence. The evidence abundantly shews the threats. The plaintiff's own conduct abundantly shews the apprehension of the threats being carried into execution, and the circumstances attending the fire abundantly prove that they were carried into execution.

The contract has made the answer to the question a warranty, and so material; but if this were otherwise, there is no doubt of its being material, upon the evidence, as a question of fact.

The plaintiff is not, in our opinion, entitled to recover either on the law or evidence.

This being our opinion, there can be no verdict entered by us for the plaintiff, and the only question remaining is, whether there should be a new trial for alleged improper reception of evidence.

The grounds stated are two:

1. The learned Vice-Chancellor allowed the defendants to give evidence to contradict the evidence of their own witnesses, who were not adverse witnesses. 2. And received the evidence of Lafayette Young in corroboration of the defendants' witness, Natrass (the agent of the company,) after the close of the plaintiff's evidence in rebuttal.

It is provided by section 27 of Rev. Stats. Ont., cap. 62, that "a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but in case the witness, in the opinion of the Judge, proves adverse, such party may contradict him by other evidence, or may, by leave of the Judge, prove that the witness made, at other times, a statement inconsistent with his present testimony."

The origin of this section is the English Common Law Procedure Act, 1854, sec. 22, from which sect. 214 of our Common Law Procedure Act was transcribed.

The English enactment was much discussed in *Greenough v. Eccles et al.*, 5 C. B. N. S. 786.

Williams, J., at p. 802, said: "The section lays down three rules as to the power of a party to discredit his own witness; first, he shall not be allowed to impeach his evidence by general evidence of bad character; secondly, he may contradict him by other evidence; thirdly, he may prove that he made at other times a statement inconsistent with his present testimony.

"These three rules appear to include the principal questions that have ever arisen on the subject, as may be seen by referring to the chapter in *Phillips on Evidence*, which treats of the right of a party to disprove or impeach the evidence of his own witnesses. And it will there be fur-

ther seen that the law which relates to the first two of these rules was settled before the passing of [the Act; while, as to the third, the authorities were conflicting; that is to say, the law was clear that you could not discredit your own witness by general evidence of bad character, but you might, nevertheless, contradict him by other evidence relevant to the issue. Whether you could discredit him, by proving that he made inconsistent statements, was to some extent an unsettled point.”

Cockburn, C. J., said, at p. 806: “Looking at the 22nd section of the C. L. P. Act, 1854, I think it is clear that there has been a great blunder in the drawing of it, and on the part of those who adopted it. The first two branches of the section were evidently intended to be declaratory of the existing law, but the third branch goes far beyond it. It was intended to give a party producing a witness an opportunity, with the leave of the learned Judge, if the witness should prove adverse—which I agree with my learned brothers must, in this part of the section, be understood to mean hostile—of shewing that he had previously made a statement contradictory of his then testimony; but unfortunately the word adverse, instead of preceding the third branch of the section only, is made to precede the second branch, which is clearly declaratory of the existing law.”

In the case now before us we are only concerned with the third branch of the section. All the Judges in *Greenough v. Eccles et al.*, agreed that the word ‘adverse,’ as used in the section, meant ‘hostile,’ and not simply unfavourable to the side of the party calling the witness.

Sir J. P. Wilde, in *Coles v. Coles and Brown*, L. R. 1 P. & D. 71, said, “A hostile witness is a witness who, from the manner in which he gives his evidence, shews that he is not desirous of telling the truth to the Court.”

This was exactly the opinion formed by the learned Vice Chancellor of the witnesses whom he ruled to be adverse, and allowed to be contradicted by previous statements made by them; and there was, independently of that

testimony and excluding it, ample evidence to sustain the defence.

The learned Vice Chancellor saw the witnesses and heard their testimony. He could and did observe their conduct and demeanour when giving evidence. His opinion, and not ours, is the one which ought to prevail as to whether the witnesses were adverse in the sense which we have described.

In *Grenough v. Eccles*, the question before the Court was, whether the ruling of Cockburn, C. J., that a particular witness was not adverse, was a right ruling, and Willes, J., at p. 806, said, "Moreover, even if the Lord Chief Justice had been wrong, I should have been, as at present advised, of opinion that we have no jurisdiction to review the ruling. In order, no doubt, to prevent the increase of causes of new trial, the Legislature have, as it appears to me, in terms made the opinion of the Judge upon that point absolute, and therefore final."

Although this was only a dictum it was the dictum of of a very learned Judge, and in our opinion correctly expresses what we take to be the sound construction of the language used in the section.

Whether the witness proves adverse is not for the opinion of the Court, on review of the Judge's decision, but, in the language of the Act, for "the opinion of the Judge," whose opinion, owing to his situation at the time of the giving of the testimony, is necessarily of more value than can be the opinion of those who afterwards can do no more than read the testimony which has been reduced to writing.

We, however, if the matter be properly before us, entertain no doubt of the correctness of the ruling of the learned Judge in holding the witnesses to be adverse whose testimony he allowed to be contradicted. See *Faulkner v. Brime et al.*, 1 F. & F. 254; *Dean v. Knight*, Ib. 433; *Martin v. Traveller's Ins. Co.*, Ib. 505; *Pound v. Wilson*, 4 F. & F. 301; *Amstell v. Alexander*, 16 L. T. N. S. 830; *Jackson v. Thomason*, 1 B. & S. 745; *Wright v. Wilkins*, 4 Jur. N. S. 804; *Ohlsen v. Terrero*, L. R. 10 Ch. 127.

The reception of the evidence of a witness, adduced by the defendants after the reply of the plaintiff, even if for the purpose of corroborating the defence, was a matter entirely in the discretion of the learned Judge, and clearly not the subject of review. The object of a trial is, or ought to be, the pursuit of truth. The ordinary rules of procedure at a trial are deemed convenient to attain that end; but particular cases may arise, and particular cases do arise, where a rigid adherence to this procedure would be to defeat the purpose of the procedure. In such a case there must be a discretion in the presiding Judge to allow witnesses to be called, even out of the ordinary course, where in his judgment the interests of justice demand it. The question proper for review, in such a case, is whether the evidence of the witness so received was material to the issue.

If this question must be answered in the affirmative, there is no ground for a new trial. If the witness was an admissible witness, the order of his admission is not the subject of enquiry on the application for a new trial.

ARMOUR, J., concurred.

Rule discharged.

BLACK V. REYNOLDS.

Trover against sheriff—Estoppel.

In trover for the value of a piano, sold by the defendant, as sheriff, under an execution, it appeared that an interpleader had been directed as to the piano, the plaintiff to give the usual security within twenty days for its value, to be appraised by the defendant. The defendant, though applied to, neglected to appraise the piano until it was impossible for the plaintiff to give security within the required time. Security was, however, afterwards given, but the defendant nevertheless sold the piano, contending that he was justified in so doing, as the plaintiff had not complied with the terms of the order: *Held*, that the plaintiff having been prevented by the defendant's neglect from complying with the order, defendant was estopped from saying that plaintiff's non-compliance therewith justified him in selling.

Held, also, that the effect of the defendant's neglect was either to deprive him of the protection of the order or to operate as a waiver of the time thereby limited for giving security; that if the former, he was not justified by the order in selling; if the latter, he was not justified, after the bond was allowed and filed, of which he had notice; but whether he had or had not notice of the allowance and filing of the bond, *Held*, that his duty, under the circumstances, was to have ascertained whether the payment had been made or security given before selling, and, if so, to have withdrawn from possession.

Observations on the exorbitant charge for fees and possession money made by the sheriff.

TROVER for a piano.

Pleas, not guilty, and a denial of the plaintiff's property.
Issue.

The case was tried before Harrison, C. J., at the last Whitby Assizes, without a jury, when a *pro formâ* verdict was rendered for the defendant, and the value of the piano was assessed at \$450, in order that the verdict might be entered for the plaintiff for that sum if the Court should consider her entitled to recover.

The piano in question was seized by the defendant under an execution at the suit of one Drouillard against one Walker, as the property of Walker, and was claimed by the present plaintiff, whereupon the defendant applied for and obtained an interpleader order, which directed that upon payment of the appraised value (to be appraised by said sheriff) of the goods and chattels under seizure, and claimed by the said claimant Sarah Black, being one piano, into Court by the said claimant within twenty days from date, or upon giving within the

same time security to the satisfaction of the deputy clerk of this Court, at Whitby, for the payment of the same amount by the said claimant according to the directions of any rule of Court or Judge's order to be made therein, and upon payment to the said sheriff of the possession money from the date thereof, the said sheriff should withdraw from the goods and chattels seized by him under the writ of *fiery facias* issued therein, and claimed by the said claimant: that unless such payment should be made, or such security given within the time aforesaid, the said sheriff should proceed to sell the said goods and chattels, and pay the proceeds of the sale, after deducting the expenses thereof and the possession money from the said date, into Court, to abide further order: that the parties should proceed to the trial of an issue in the Court of Common Pleas, in which the said claimant should be plaintiff and the said execution creditor defendant, and that the question to be tried should be, whether at the time of the seizure of the said goods, &c., the same were the property of the claimant as against the execution creditor: that such issue should be prepared and delivered by the plaintiff therein within thirty days from the date of the order, and be returned by the defendant therein within ten days thereafter, and be tried at the then next ensuing Spring Assizes in and for the county of Ontario, &c.

After the interpleader order issued, the plaintiff's attorney made several applications to the defendant for the appraisement, under the order, of the value of the piano, with a view of giving the security, but could not succeed in getting it until the defendant sent it to him by letter of the 6th of December, and the delay thus occasioned by the defendant rendered it impossible for the plaintiff to give the required security within the twenty days limited by the order.

The plaintiff's attorney, however, prepared a bond, and after considerable delay in procuring it to be executed, filed it on the 6th of February, 1877, with the Deputy Clerk of the Crown, at Whitby, who allowed the same as

security to his satisfaction within the terms of the interpleader order.

The defendant, however, proceeded and sold the piano on the 15th of February, 1877, whereupon this action was brought.

The defendant contended that he was justified in selling, the terms of the interpleader order not having been complied with; while the plaintiff denied that he was so justified, because the security had been given before the sale, and there was no possession money payable.

It was admitted at the trial that the piano was the property of the plaintiff, and it was agreed that the facts appearing in *Black v. Drouillard*, 28 C. P. 107, were to be taken as proved in this case.

Hector Cameron, Q. C., 21st May, 1878, obtained a rule nisi to enter a verdict for the plaintiff for \$450, pursuant to leave and the Law Reform Amendment Act, or, if necessary, to amend the declaration, as moved at the trial, and enter a verdict for the plaintiff thereon; or for a new trial, on the law and evidence.

F. Osler, 30th May, 1878, shewed cause. The bond given was open to objection, as the name of one of the sureties was omitted; nor was there any affidavit of execution. There was no bond given within the terms of the order. On default the sheriff was directed to sell, and there was default. There was no notice given to the sheriff of the bond when received.

H. Cameron, Q. C., contra. The sheriff delayed making his appraisement till the 18th day. The sheriff could not sell for the possession money. There is no provision as to giving notice of the allowance of the bond. The sheriff proceeded at his peril; his business was to have searched before selling.

June 29th, 1878. ARMOUR, J.—The only material contradiction in the facts appearing at the trial was, whether the defendant had notice of the filing of the bond before

the sale, but the conclusion I arrive at as to this, a conclusion in which the learned Chief Justice who tried the cause agrees, is that the defendant had such notice.

I think that the plaintiff having been prevented by the neglect of the defendant in making the appraisement, from giving the required security within the twenty days, it does not lie in the defendant's mouth to say to her, "You did not comply with the interpleader order by giving the security within the twenty days, and I am therefore justified in selling your property."

The effect of such, the defendant's neglect, was, in my opinion, either to deprive him altogether of the protection of the interpleader order, or to operate as a waiver of the time thereby limited for the giving of the security. If the former was the effect of his neglect, he was not justified by the order in selling; if the latter was the effect of it, he was not justified in selling after the bond was filed and allowed.

Although I think the proper conclusion of fact is that the defendant had notice of the filing and allowance of the bond, yet, whether he had or not, I think it was his plain duty, under the circumstances of this case, to have ascertained whether payment had been made or security given before he sold the property, and if he had found either that payment had been made or security given, as required by the order, he ought to have withdrawn from the possession.

I have said nothing about the payment of possession money, because in this case there was no possession money.

One cannot help seeing, by a perusal of the evidence, that the difficulty the defendant has placed himself in was caused by his making an exorbitant demand for fees which were not claimable, and for possession money which was not chargeable.

In his letter of the 6th of December, 1876, he claimed for sheriff's fees and possession money \$42. In a letter written on the day the bond was filed, he demanded for sheriff's fees and possession money \$89; after the sale of the piano he deducted from the proceeds, which were \$225,

the sum of \$136.05 for sheriff's fees and possession money. Upon the taxation of his fees by the proper officer, he was allowed \$27.70 in all, no possession money being allowed, and upon the evidence in this cause there could be no pretence for claiming any.

The Court is always most anxious to protect its officers, but in order to entitle themselves to such protection, they must make at least a faint effort to merit it.

I think the defendant was not justified in selling the plaintiff's property, and is not protected by the interpleader order, and the rule should be made absolute to enter a verdict for the plaintiff for \$450 damages.

HARRISON, C. J., concurred.

Rule absolute.

WESTLOH V. BROWN.

Promissory note—Indorser—Alteration without notice—Promise to pay.

After the making of a promissory note, it was altered by the maker as to the time of payment, without the consent of the indorser, who, however, but without knowledge of the alteration, promised to pay it: *Held*, in an action against the indorser, that the alteration having been made without his authority rendered the note void, and that no subsequent promise by him to pay could have the effect of ratifying it.

Held, also, that without *actual* knowledge of the alteration the promise to pay amounted to nothing, the means of knowledge alone being insufficient.

ACTION on a promissory note for \$450, dated the 20th of November, 1876, payable twelve months after date, made by one Wilson and endorsed by the defendant and one Ralph Brown, with interest at eight per cent.

Plea: denial of endorsement.

Issue.

The case was tried at the last Spring Assizes before Burton, J.A., and a jury.

The facts were as follow :

One Wilson being indebted to the plaintiff in the sum of \$300, the plaintiff offered to advance him \$150 more if he (Wilson) would give him his father or one Walper as security. Wilson said he could not get his father, but that he could get his two brothers-in-law, the defendant Robert Brown and one Ralph Brown, to which the plaintiff assented.

Subsequently Wilson handed to the plaintiff, in the presence of Walper, a promissory note, bearing date the 20th of November, 1876, made by him (Wilson), payable twenty-six months after date, to Henry Westloh, or bearer, for the sum of \$450, with interest at the rate of eight per cent. per annum, endorsed by the defendant and by Ralph Brown.

Walper thereupon read the said note to the plaintiff, and when he read "twenty-six months after date," the plaintiff said, "I am not going to take that note." Wilson said, "Why?" Plaintiff said, "I only promised to give you the money for twelve months, and this is for twenty-six months." Wilson said, "We can alter it"; and he accordingly struck out "twenty-six" and inserted "twelve" in lieu thereof, and the plaintiff took it and paid over the \$150.

The defendant was not present when this alteration was made, nor had Wilson any authority from the defendant to make the alteration, nor did Wilson profess to act, in making the alteration, for the defendant.

The promissory note so altered was the promissory note sued on in this action.

At the trial the handwriting of the defendant was proved and evidence was adduced that, during the currency of the note and after its maturity, the defendant had promised to pay it, and that it had been shewn to him, and that he had looked at it and had it in his hands; but his attention was never called to the alteration, nor was it

proved that when he made the promises he had actual knowledge of the alteration.

The defendant positively denied any authority in Wilson to make the alteration, and denied ever having promised to pay the note after he became aware that it had been altered.

It appeared also in evidence that the plaintiff had, on the advice of his solicitor taken criminal proceedings against Wilson for forgery in making the said alteration, from which criminal proceedings Wilson was discharged, but how did not appear.

The learned Judge left the following questions to the jury:

1. Was the alteration in the note made before it was transferred to the plaintiff, and without the original consent of the endorser?

2. Did the defendant afterwards, and before the maturity of the note, with a knowledge of the alteration, assent to it?

3. Assuming that the conclusion arrived at be, that the defendant ratified the endorsement of the note by a promise to pay, did the defendant promise to pay after the same became due, and after he had received notice of its non-payment?

To each of these questions the jury answered "Yes."

A verdict was thereupon entered for the plaintiff, with leave reserved to the defendant to move to enter a nonsuit.

F. Osler, 23rd May, 1878, obtained a rule *nisi* to set aside the verdict and enter a nonsuit pursuant to leave, or for a new trial on the law and evidence, and weight of evidence, on the ground that on the answers of the jury to the questions submitted to them, the verdict should have been entered for defendant.

S. Richards, Q. C., 5th June, 1878, shewed cause. The alteration was made before the note had actually become a complete note, and defendant knew that it had been so altered and promised to pay it: *Downes v. Richardson*, 5 B. & Al. 674; *Tarleton v. Shingler*, 7 C. B. 812.

Osler, contra. The plaintiff was a party to the forgery: he had knowledge of it from the first. There was an alteration without consent and without previous authority, which rendered the note void, and no subsequent promise could ratify what had been done, for there was nothing to ratify: *Brook v. Hook*, L. R. 6 Ex. 89; *Turner v. Wilson*, 23 C. P. 87. There is no estoppel. There is no principle on which there might be presumptive evidence of authority; but here he denies it. It was not done for his benefit, and under *Turner v. Wilson* it is incapable of ratification. Besides, there was no consideration for the ratification. *Downes v. Richardson*, 5 B. & Al. 674, is distinguishable. It turned on the Stamp Act.

29th June, 1878. ARMOUR, J.—It was contended at the trial, and that contention is renewed before us, that the alteration having been made without the authority of the defendant rendered the note void, and that no subsequent promise by the defendant to pay it could have the effect of ratifying what was thus rendered void.

I am of opinion that this contention must prevail.

The case of *Master v. Miller*, 1 Smith L. C., 7th ed., p. 871, shews that the alteration avoided the note; and the case of *Brook v. Hook*, L. R. 6 Ex. 89, is authority that a note so altered, as this was, cannot be ratified. See also *Story* on Agency, 8th ed., sec. 240.

I am also of the opinion that there being no evidence that the defendant had actual knowledge of the alteration when he made the promises to pay, they amounted to nothing, *actual* knowledge being necessary, and not merely *means* of knowledge—*Bell v. Gardiner*, 4 M. & Gr. 11—and on this ground also I think the plaintiff must fail.

The rule will therefore be absolute to enter a nonsuit.

HARRISON, C. J., concurred.

Rule absolute for nonsuit.

MCARTHUR V. EAGLESON.

Ejectment—Estoppel in pais—Statute of Limitations.

Plaintiff, intending to return after a short interval, left his wife and home more than thirty years ago, and went to the United States, where he remained until a short time before this action. He had never communicated with his wife or friends whilst absent, and was, until his return, two or three years ago, believed to be dead. Several years since, and within seven years after his departure, his wife, acting on this belief, married again, and lived with her new husband on plaintiff's farm. They both mortgaged the farm to a Building Society, which sold it under a power of sale in the mortgage. On his return, the plaintiff brought ejectment against the purchaser from the company:—*Held*, that he was entitled to recover, and that, however culpable he might have been in not communicating with his wife, his negligence did not, even as against a purchaser, under the *bonâ fide* belief that he was dead, estop him from claiming the land. *Held*, also, WILSON, J., dissenting, that he was not barred by the Statute of Limitations, for the possession of his wife was his possession.

EJECTMENT for the north half of lot number 16 in the 1st concession of Eckfrid.

The plaintiff claimed as patentee of the Crown.

The defendant, besides denying the plaintiff's title asserted title, by length of possession, under William Davidson, who took possession in 1853, and continued in possession till 1872, when he conveyed the said land to the Canada Permanent Loan and Savings Company, by mortgage dated the 10th of February, 1872, under which mortgage the company took possession from Davidson, in May, 1875, and continued therein until March, 1876, when they sold and conveyed the same to the defendant by deed, dated 28th of March, 1876, under which he took possession, and so remained ever since.

The cause was tried at the last Fall Assizes at London, before Harrison, C. J., without a jury. The following facts appeared:

John McArthur, the plaintiff, said: "I took up the land in 1834 or 1835. I planted ten bushels of potatoes on the land that year. I finally went on to it in 1838; we commenced clearing on it. I got the lot from Col. Talbot, and I had to do settlement duty on it. I got a certificate entitling me to a patent shortly before I went away. I went

away in March, 1847. I have built a barn and a small house on the lot. My marriage must have been in 1845, as near as I can get it. I was married, in London, to Christie McCrae. A tavernkeeper, named McFee, was present, and my brother Duncan stood with me, and her sister stood with her. When I went away I left two good milch cows, two heifer calves, and fifteen head of sheep, some with lambs, also potatoes and wheat in my brother's barn. I left all that to support my family till I should return. I had one daughter then. I told my brother Duncan to see to my family while I was away. I went away to get money to get the deed and to buy a yoke of oxen or horses. My wife knew I was going away. She prepared everything for me to go with. I went to London alone. I left London with Peter McAlpine, who was married to my sister, and her nephew Malcolm, and one McDougall, from Lobo, and another man whose name I do not know. We were all to go to Buffalo to try to get on some craft to earn money. I was going to return as soon as I could. My intention was to return in a year and a half, or two years at the most. I was anxious to get the money. We got to Buffalo on the 14th or 15th of March, and got work a few days afterwards. I went several trips on the upper lakes and only saved \$25. I went down the Mississippi that Fall, and worked for a horse doctor. I was there until 1849. I got the ague in the summer of 1848, and had it all that summer, and it stuck to me, and I went to the hospital for two months in 1849, and the doctor advised me to go to the upper country. I then went to Cleveland. I worked for a month or two at brick making, but the man did not pay me. I saw Duncan McDonald, of Eckfrid, at Cleveland in July. I told him I was sick and penniless, a skeleton, and that I could not stand the cold if I were to go home. I then went to Buffalo to get rid of the ague, and I stayed there until late in the fall. Then I went to Cleveland for the money—I had not been paid—and then went down the Mississippi again; that was in 1849. I went to Memphis and stayed there all winter. I did not earn money. I sawed wood,

and did anything I could. In the spring of 1850 I went to St. Louis. I was in Missouri. I would shake one day and work the next. In the fall I got to St. Joe, Missouri, and I took a job to grub ten acres, and there I saved some money; but I had to buy clothes in the spring, and I had not six dollars left. In the spring I went along with a Mormon train to Salt Lake city. It took them the whole summer to get there. I did not become a Mormon. I did not take any more wives. I had a good little woman at home, and thought too much of her. I wanted to get to California, but could not get any further that fall: that was in 1851. I remained in Salt Lake City that winter. I chopped twenty cords of cotton wood, and took flour and beef for it. Money I could not get. I went to Los Angeles Valley, in California, in the Spring of 1852, and worked for an Englishman, William Workman. I was two months and a half there. I was in California twenty-five years. I went to the diggings in August, 1852, and remained there until last May, 1877. I never heard from home in the meantime. I made money in California, but lost it again. I first heard from home a year ago last June, 1876. I came home again last June, 1877, and this action was brought shortly after. After leaving Canada I never returned to it until last June. When I came, I found Eagleson living on my lot. My wife was not living on it then. I never wrote to her all the time I was away. In fact I could not write anyhow. I should have had to get somebody to do it for me."

Cross-examination.—"Money was not very easily made in California when I was there, but it was easily lost. Two men, who were married to two sisters, each borrowed \$2,000 of me. They told me they would pay me any time I wanted it. They did not pay me, and I lost \$4,000. I lost some more money in consequence of having to pay the debts of a company I belonged to, \$300 and \$500. I lost the first of the money in 1859. I did not keep the money in a bank. I buried it as I was digging it. It was in 1855 and 1856 I made my first big strike. I had

not much money all at once during these years, but I have money. I was in camp during that time. * * * When I went away I left the certificate for the land in a bible, and I told my wife of it. * * * My brother Peter took out the patent in my name. * * * I did not think it safe to send the money from California. * * * I hated to come back without money, and when I had some I wanted to make more. My brother found out where I was from a man named McIntyre, and wrote to me to come back. McIntyre saw me a year ago in Sierra County, on the Indian Hills in California. * * * I was sick. * * My brother had to send me money to bring me back. * * I was glad to go back, as I was so sick I could not do a day's work. * * * I have seen my wife since my return. I do not know whether she is living with Davidson or not. She was at a neighbour's house, and sent for me. I do not know what the state of her mind is now. I have not seen her lately. She wanted me to take her, but I told her that I was as poor as herself then. That was shortly after my return. I saw her for part of a day. I have not seen her since."

Re-examination.—"I was never able to save anything after 1859. My health was bad, and the doctor's bills took what I made after that. I had not money to come home. I would have come if I had had the money; of course I would."

The plaintiff was clearly identified by his brother, Duncan, and by his brother-in-law, Peter McAlpine.

The evidence for the defence shewed that the plaintiff's wife lived on the land, after he went away, with her child, and that she had another child by the plaintiff, born soon after he left. The first child died; the second one got married and moved to the United States. In 1853, William Davidson, a shoemaker, married the plaintiff's wife, and had nine children by her, seven of whom were still living. On the second marriage the plaintiff's wife and Davidson continued to live on the land. On the 10th of February, 1872, Davidson and the plaintiff's wife jointly, of the one

part, mortgaged the south half of lot 15, in the 1st concession of Eckfrid, which Davidson owned in his own right, and also the land in question in this cause, to the Canada Permanent Building and Savings Society * for \$2,900. They both signed by their mark. The plaintiff's wife was examined before two Justices as if she was selling her own real estate; default was made on that mortgage, and they were both ejected from the land. The Society put a person in possession, and afterwards sold the land to the defendant at public sale. The Society gave the plaintiff's surviving daughter, Mary House, \$500 for a deed from her and her husband to the Society, which was dated the 9th of October, 1875. The Society no doubt believed that the plaintiff was dead, and that his only daughter was the heir at law of the land. Davidson was assessed for the land after his marriage. The plaintiff's wife before that was too poor to pay the taxes. There was evidence that Davidson during his occupancy dealt with the land as his own.

Davidson was examined for the defence. He said, among other things not material here, "I was not a man fit for farming. I went on shoemaking. I got the farmers to do the farm work. I settled with them for it. I hired what work I wanted done. I raised on the farm what kept the family as well as I was able. The family did not want for anything any way. I went on in May, 1853. I was assessed from that time, and paid the taxes all along till the company put me off. Everybody pronounced McArthur to be dead when I married his wife."

He also said the plaintiff's eldest daughter died in 1860, and his second daughter lived with her mother till 1860, then went to service, and in 1865 or 1866 she married and removed to the United States, where she had ever since lived.

Cross-examination.—"I gave a mortgage to the company. I did not suppose it was on this lot. I supposed it was on the lot that I had bought. I did not intend to mortgage this lot at all. I never claimed this lot as my

* Now the Canada Permanent Loan and Savings Company.

own. I claimed it as my wife's and the children's. * * * I never made any claim to the land as my own property. I considered it might be my wife's and the children's. I treated it that way. I consulted my wife when I did anything with the land, and we both agreed to it."

Re-examination.—"If McArthur had come back I would not have given up possession to him. I would want to see what authority he had. I do not know that I would have given it up to him after twenty years. I was not making any improvements, to call improvements. I just cut wherever I could make money by it. I cut wherever I could sell the cordwood."

Re-cross-examination.—"McArthur's friends were telling me he would come home, and so I would not make any improvements, and I just lived on it."

He also said, in his evidence, that it was the report one day that he was dead, and another day that he was alive.

The learned Chief Justice, after hearing the arguments of counsel, decided as follows :

"I am not free from doubt as to the questions raised. The case is a very extraordinary one. I never recollect hearing of one like it, and I have no doubt my finding will be brought before the full Court. At present I find as follows:

1. That the plaintiff is patentee of the Crown.
2. That after the plaintiff left the country, his wife remained in possession of the land.
3. That when the plaintiff left the country, he had no intention of abandoning the land.
4. That the plaintiff's wife, acting under the belief that the plaintiff was dead, married Davidson.
5. That Davidson never was in possession except for the plaintiff's wife, and under her.
6. That there was no dispossession of, or discontinuance by, the plaintiff.

I therefore find a verdict for the plaintiff, expressing the hope that the full Court will be enabled to consider the case."

In Michaelmas Term last, *McMahon*, Q. C., obtained a rule *nisi* calling upon the plaintiff to shew cause why the verdict obtained in the cause should not be set aside and a nonsuit or verdict be entered for the defendant, on the ground that the verdict was contrary to law and evidence, and the weight of evidence, and the verdict, upon the law and evidence, should have been for the defendant.

Rock, Q. C., 1st December, 1877, shewed cause. The evidence shewed that after Davidson's marriage, in 1853, no change was made in the occupation of the land. The plaintiff's wife was there before that marriage, and she continued there after it, just as before. Davidson got no possession or claim as against her, and he made no claim to it himself. He claimed it only for his wife and children. The wife cannot have an adverse possession to her husband. The defendant, who claims under the Loan Company, can't set up any title from Davidson, because they derive title from the plaintiff's wife, who mortgaged the land in question, along with her husband, as her own real estate. He referred to *Doe d. Sheppard v. Bayley*, 10 U. C. R. 310, 320; *Butler v. Donaldson*, 12 U. C. R. 255, 264; *Leith's Blackstone*, 28, and note (f); *Kipp v. The Incorporated Synod of the Diocese of Toronto*, 33 U. C. R. 320; *Lloyd v. Henderson*, 25 C. P. 253; *Foster v. Emmerson*, 5 Grant 135, 149; *Ketchum v. Mighton*, 14 U. C. R. 99.

Robinson, Q. C., *McKenzie* with him. There has been a discontinuance of possession by the plaintiff. *Discontinuance* is the voluntary act of the owner: *dispossession* is the loss of possession by the act of another: *Doe d. Taylor v. Proudfoot*, 9 U. C. R. 503. The plaintiff left the land in 1847, not with the intention then, it may be, of discontinuing, but his subsequent act shews he changed his intention, and his conduct must be considered, not by what he said, but by what he did. After leaving this country in 1847 purposely to earn money to be expended on his farm, he went to Buffalo, and from there he sailed on the upper lakes, as a sailor, to Cleveland, Chicago, and other ports, for four or five

years, and at that time he never went to his home, nor wrote to his wife or relations, although he was within a twenty-four hours' journey of his home during the period. That is evidence of a discontinuance of possession by a very strong and unquestionable act, which has not been satisfactorily explained. In the spring of 1852 he went to Salt Lake City, and from thence he went to California, where he remained for about twenty-five years; yet in all that time he never wrote to his wife or to his relations; and although he had made, about the year 1855 or 1856, as much as \$4,000, he not only did not return home, but he shewed no intention of doing it; on the contrary, he stayed deliberately away, upon the pretence that he wanted to make more money before he went back, although that sum was far more than he had ever thought of acquiring when he first of all left the country. He says he lost that money; but if he could not come back with that money, he could come back without it, if he really wanted to return, or he could have written to his people shewing he was alive, and telling them where he was. He remained there, however, poor and sick, as he says, without ever trying to get back until thirty years from the time that he left; and even then he would not have returned if money had not been sent to him to bring him back; and when he does come, his wife is married to another man, under the belief that the plaintiff was long since dead, the mother of eight or nine children by that marriage, and his own daughter, born to him after he left his home, married and settled in the United States. After so long and unexplained an absence, for his attempted explanation is not in anyway satisfactory, there is very strong evidence, and almost, if not quite conclusive, of a discontinuance of possession by the plaintiff. The plaintiff's wife married Davidson, her second husband, in 1853, and he moved on to the land where she was then living, and continued to occupy it with her and his family till 1874, when he was ejected by the Canada Loan Company, to whom he and his wife had given a mortgage upon the land for money borrowed by them. If the wife had

not married a second time, and had continued to reside upon the land from 1847, when her husband went away, until 1877, when he came back, it may be that the husband's right to the land might not have been lost; but that is not the state of things. Davidson, her second husband, went on the land in 1853, and he did not leave it till 1874, so that he gained an adverse title, adverse so far as that is required under the present law of limitation. He gained, as against the plaintiff, a perfect title by more than twenty years uninterrupted possession. The wife, it may be admitted, held the land before her second marriage as the agent of her husband. Her second marriage, illegal as it was, put an end to that agency, and Davidson held the land as the husband of his wife, as he supposed her to be, as he said he did. But it made no difference how or for whom he held it, so long as it was not for the plaintiff; and even then a mere verbal declaration that he held it for the plaintiff would not avail against an actual twenty years' possession by himself, the plaintiff all that time being away from the land, by an act of discontinuance of his possession. Suppose the plaintiff, instead of being in California, had lived in the same county or township for thirty years, the land being held by his wife and Davidson, would not that have been a clear discontinuance? The following cases were referred to: *Atkyns v. Pearce*, 2 C. B. N. S. 764; *Doe d. Cuthbertson v. McGillis*, 2 C. P. 124, 139, 142, 144; *Williams v. Pott*, L. R. 12 Eq. 149; *Smout v. Ilberry*, 10 M. & W. 1; *Zealand v. Dewhurst*, 23 C. P. 117; *Williams v. McDonald*, 33 U. C. R. 423, 437; *Kelly v. Drew*, 12 Allen 107; *Pringle v. Allen*, 18 U. C. R. 575; *Gray v. Richford*, 1 E. & A. 112; *Regina v. Lumley*, L. R. 1 C. C. R. 196; *Doe d. Hagerman v. Strong*, 4 U. C. R. 510; *Doe d. Perry v. Henderson*, 3 U. C. R. 486; *McDonald v. Kintrea*, 10 Ir. L. R. 574; *Lane v. Ironmonger*, 13 M. & W. 368; *James v. Salter*, 3 Bing. N. C. 544, 553; 2 *Kent's Comm.*, 12th ed., 147; *Williams Executors*, 6th Am. ed., 319; 1 *Bishop on Marriage and Divorce*, 584, 589, 592, 597; *Bishop's Married Women*, 132; *Vin. Ab.*, Baron & Feme, 92, *Disseisin* 99.

After this argument, it was suggested by the Court that if the Statute of Limitations did not apply, the plaintiff might be estopped from claiming the land, as against a *bonâ fide* purchaser for value, by reason of his long voluntary and unexplained absence, without being heard of or from, and without any excuse for such silence, leading those who were interested in the land to believe that he was dead, and that they might deal with the land as if he were dead, and that such conduct was necessarily calculated to induce such a belief, and did do it in point of fact; and the case was ordered to be argued again before the full Court upon that point.

The case was accordingly again argued in Hilary Term last.

Ferguson, Q. C., and *Rock*, Q. C., appeared for the plaintiff, and *Robinson*, Q. C., for the defendant. Many authorities were cited, but, as the Court afterwards expressed an opinion that the law of estoppel did not apply, it is unnecessary to give the cases cited or the arguments upon them.

It was afterwards suggested that it would be better to have the question arising on the Statute of Limitations, argued before the full Court, as Mr. Justice Armour had not heard that part of the case.

In Easter Term last, *Rock*, Q. C., and *Ferguson*, Q. C., again appeared for the plaintiff, and *Robinson*, Q. C., for the defendants.

It is not necessary to repeat the argument.

June 29, 1878. HARRISON, C. J.—I am of opinion that the rule *nisi* should be discharged.

As to all the points raised at the trial, subsequent consideration has confirmed the opinion which I expressed at the trial.

The only point raised since the trial, that of estoppel, must, we all think, be decided in favour of the plaintiff.

If we were to hold, on the facts of this case, that the plaintiff, being the owner of the land, and not otherwise

prevented from recovering possession, is estopped from claiming it as his own, we would be carrying the law of estoppel *in pais*, not only further than it has yet been carried by any decided case in England or in this Province, but further than warranted by the principles enunciated in the numerous cases for the application of the rule.

While holding and expressing this opinion, I freely admit that, as Storrs, J., said, in *Preston v. Mann*, 25 Conn. 128, "The doctrine of estoppel *in pais*, notwithstanding the great number of cases which have turned upon it and are reported in the books, cannot be said even yet to rest upon any determinate legal test which will reconcile all the decisions, or will embrace all transactions to which the general principles of equitable necessity wherein it originated demand that it should be applied. In fact it is because it is so peculiarly a doctrine of practical equity that its technical application is so difficult, and its reduction to the form of abstract formulas is still unaccomplished."

The real ground on which a person is precluded from proving that his representation, on which another acted to his prejudice, is false, is that to permit it would be inequitable. This is the reason that estoppel *in pais* is sometimes described as an equitable estoppel. The jurisdiction of enforcing this equity originally belonged peculiarly to Courts of Equity, and does not appear to have been familiarly recognized at law until within a comparatively recent date; but now it is, with some exceptions unnecessary to be mentioned, in its application, common alike to Courts of Law and Equity: see *Horn v. Cole*, 12 Am. 111-113.

The leading case for its application in Courts of Law, is the well known case of *Pickard v. Sears*, 6 A. & E. 475, decided in the year 1837.

Lord Denman there said, "The rule of law is clear, that where one, by his words or conduct, *wilfully* causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring

against the latter, a different state of things as existing at the same time."

The same learned Judge, two years afterwards, in *Gregg v. Wells*, 10 A. & E. 90, 97, said, in referring to *Pickard v. Sears*, 6 A. & E. 475, that "the principle of that case may be stated even more broadly than it is there laid down. A party who *negligently and culpably* stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute the fact in an action against the person whom he has himself assisted in deceiving."

Negligence alone, although it may have afforded the opportunity for the perpetration of a fraud, by means of which another party is damnified, is not of itself a ground of estoppel: per Cockburn, C. J., in *Swan v. North British Australasian Co.*, 2 H. & C. 188-9.

The rule relating to negotiable instruments stands on a peculiar footing: *Goodwin v. Robarts*, L. R. 1 Ap. Cas. 476; *Rumball v. The Metropolitan Bank*, L. R. 2 Q. B. Div. 194.

By the term "wilfully," as used in *Pickard v. Sears*, must be understood, "if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was *meant* that he should act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person by usage of trade, or otherwise, to disclose the truth, may often have the same effect": per Parke, B., in *Freeman v. Cooke*, 2 Ex. 654.

The rule, as here explained, takes in all the important commercial cases in which a representation is made not wilfully in any bad sense of the word, not *malo animo*, or with intent to defraud or deceive, but so far wilfully

that the party making the representation on which the other acts, *means* it to be acted upon in that way. See per Crompton, J., in *Howard v. Hudson*, 2 E. & B. 13.

In another part of the judgment, in *Freeman v. Cooke*, 2 Ex., Park, B., at p. 664, says: "In truth in most cases to which the doctrine of *Pickard v. Sears* has been applied, the representation is such as to amount to the contract or license of the party making it." See further, per Lord Chelmsford in *Clarke v. Hart*, 6 H. L. Cas. 633.

If any person, by actual expressions, or by a course of conduct, so conduct himself that another may reasonably infer the existence of the agreement or license, and acts upon such inference, the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct. See per Pollock, C. B., in *Cornish v. Abington*, 4 H. & N. 556, approved per Mellor, J., in *Thomas v. Brown*, L. R. 1 Q. B. Div. 722.

The representation, whether by words or conduct, according to Pollock, C. B., in *Reynell v. Lewis*, 15 M & W. 528, may be made "directly to the plaintiff, or made publicly, so that it may be inferred to have reached him."

To bring a case under the principle established by the decisions of *Pickard v. Sears*, and *Freeman v. Cooke*, it is now essentially necessary "that the representation or conduct complained of, whether active or passive in its character, should have been intended to bring about the result whereby loss has arisen to the other party, or his position has been altered:" per Cockburn, C. J., in *Swan v. N.B. Australasian Co.*, 2 H. & C. 188; for these estoppels "only justify the acts to which the conduct of the party induces": per Willes, J., in *Dunston v. Patterson*, 2 C. B. N. S. 502.

If, a man, either by words or conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby *induces* others to do that from which they might

otherwise have abstained, he cannot question the legality of the act he has sanctioned, to the prejudice of those who have given faith to his words, or to the fair inference to be drawn from his conduct: per Lord Campbell in *Cairncross v. Lorimer*, 3 Mac. H. L. C. 829, S. C. 7 Jur. N. S. 149. See further, *Ramsden v. Dyson*, L. R. 1 H. L. C. 129, 140, 168; *Acheson v. McMurray*, 41 U. C R. 494.

It is immaterial whether there is a misrepresentation of the fact as it actually existed, or a misrepresentation of an intention to do, or abstain from doing, an act which would lead to the damage of the party induced to deal on the faith of the representation: see per Lord St. Leonards in *Jordan v. Money*, 5 H. L. C. 185; see further, *Citizens' Bank of Louisiana v. Bank of New Orleans*, L. R. 6 H. L. C. 352; *Fitzgerald v. Fitzgerald*, 20 Grant 410; *Polak v. Everett*, L. R. 1 Q. B. Div. 673.

Mr. Justice Brett, in *Carr v. The London and North-Western R. W. Co.*, L. R. 10 C. P. 316, 318, made an effort to reduce the law of estoppel *in pais* to four abstract propositions:

1. If a man, by his words or conduct, *wilfully* causes another to believe in a certain state of things which the first knows to be false, and if the second believes in such a state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

2. If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts, which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of things, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

3. If a man, whatever his real meaning be, so conducts himself that a reasonable man *would take his conduct to mean* a certain representation of facts, and that it was a true representation, and that the latter was *intended* to act upon it in a particular way, and he, with such belief,

does act in that way, the first is estopped from denying that the facts were as represented.

4. If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of *culpable negligence* calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards, as against the first, to shew that the state of facts referred to did not exist.

No attempt was made, on the argument before us, to bring the case within the bounds of any of these propositions, with the exception of the third; but even to that we cannot assent. The conduct of the plaintiff, in so long absenting himself from his Canadian home, without communicating with his wife, brothers, or any other person in Canada, was most extraordinary and most censurable, and yet we cannot look upon it as in any sense amounting to a representation that another person owned his land, or that he meant, or that it must be held he meant, such a representation, if made, to be acted upon by any person whatever.

Indeed I find a difficulty at every step in attempting to apply the law of estoppel in this case.

I am unable to say :

1. That the plaintiff at any time by words or conduct misrepresented his title to the land.

2. That such a misrepresentation, if made, was ever made to the defendant or any person under whom he claims, or so publicly made, if made at all, as to make it a representation to the defendant or any person under whom he claims.

3. That if so made, it was ever meant or intended, or can be held to have been meant or intended, to be acted upon by the defendant or by any body else.

4. That the defendant, or any body under whom he claims, ever did act upon it.

On the contrary, it appears to me that the defendant—

who was a purchaser for value of the land, instead of buying land from a person not the owner, while the owner was, as in *Hoig v. Gordon*, 17 Grant 599, silently standing by, or by word or conduct misrepresenting his title—was put upon enquiry as to the title and purchase, subject to the contingency that the plaintiff, who was the true owner, might some day appear and assert title.

The presumption is in favour of life. After the lapse of seven years, the presumption is in favour of death, but not of the date of death: *Doe Hagerman v. Strong*, 4 U. C. R. 510, S. C., 8 U. C. R. 291. The presumption of death, however, is one of fact and not of law: *Lapsley v. Grierson*, 1 H. L. C. 498; *The Queen v. Lumley*, L. R. 1 C. C. 196. A man, after seven years, although presumed to be dead, is not conclusively proved to be dead, or compelled to stay presumptively dead contrary to the fact, for the benefit of a person who may have, during his absence dealt either with his property, or his wife, upon the supposition of his death. Notwithstanding the inconvenience of the reappearance of such a man under such circumstances, I know of no principle of estoppel which can be properly held, on the facts of this case, to preclude his reappearance, and upon his reappearance, the assertion of all his legal rights.

The latest case on the point is *Walker et al. v. Hyman*, 1 Ap. R. 345. It has a strong bearing on this case, and in accord with the opinion which I entertain of the case before us. The plaintiffs, who were makers of safes, sold a safe to one Hergert on a written order, stipulating that he was to give his notes at four months for the price: that his name was to be painted on the front of the safe, and that no title to the safe was to pass until payment of the price for the safe. The safe was accordingly delivered to Hergert with Hergert's name painted upon it. Afterwards the defendant seeing Hergert's name upon the safe, and seeing it in Hergert's possession, and believing it to be his safe, purchased the safe from him, and it was held that the plaintiffs were not estopped by their conduct from proving their ownership of the safe.

The learned Judge, Burton, J., who delivered the judgment of the Court, in one part of his judgment, after reviewing the cases, said, at p. 353, "The party must so conduct himself that a reasonable man would consider his conduct in the light of a representation, and believe that it was meant he should act upon it, and the party for or to whom it was made must have acted on it as true." And in a subsequent part of the same judgment he said, at p. 355, "I am of opinion that what took place here did not amount to a representation either to the defendant or to the public generally, upon which he or they might be expected to act in reliance on it, and that the plaintiffs are not estopped from shewing the real facts."

It is needless to refer to any more of the many cases on the subject, for none of them are actually at variance with the rules laid down in the last case, and if they were, it would still be our duty to follow the last case upon the point, when that case is a decision of the highest Court in this Province.

It appears to me that much more might be said in favour of estoppel in *Walker et al. v. Hyman*, than can be argued here. In that case there was a something which looked like an assertion of the ownership of the safe inconsistent with the real ownership, and that assertion was made by the persons who were the real owners, and made, as it were, to the public. In this case, there is nothing but the unexplained absence of the owner of the land away from the land, and ignorant of what was being done with it for a number of years, without the semblance of assertion of title in anybody other than himself.

It is impossible to hold that the plaintiff in this case was any more in the position of an owner making a representation of title by words or conduct, or standing by at the time of the sale of property, than were the plaintiffs in *Walker et al. v. Hyman*.

It is equally impossible to hold that the defendant in this case was any more in the position of a purchaser of property on the faith of any representation by word or

conduct made by the owner thereof, than was the defendant in *Walker v. Hyman*.

The attempt to bring the present case within the bounds of the law of estoppel *in pais*, as understood and administered in England and this Province, in my opinion entirely fails. See *Johnson v. The Credit Lyonnais Co.*, L. R. 3 C. P. Div. 32.

June 29, 1878. WILSON, J.—In this case I have been in very considerable doubt from the beginning. At first I was of opinion there was no defence, under the Statute of Limitations, against the plaintiff, because his wife was, until within the last three years, in possession of the land, and as Davidson, her second husband, claimed by, and through her, that he had no defence against the plaintiff, as she had not; but I was inclined to think that a defence by estoppel might be raised against the plaintiff under the circumstances of the case.

Then I was of opinion that Davidson, the second husband, might successfully sustain a defence under the Statute of Limitations, although the wife could not; and after the last argument I am of that opinion still.

It is clear that, as the plaintiff is the patentee of the land, and has never parted with it, he must be entitled to recover in this action, unless he has lost his right by length of possession held against him by some one who is enabled to set it up against him. The plaintiff had, before this action was begun, been out of the actual possession of the land for thirty years; but from 1847, when the plaintiff left the land and left the Province, until 1853, his wife lived upon it, and from 1853, when she married Davidson, until May, 1875, Davidson and she together lived upon the land as husband and wife. The land from May, 1875, remained in the hands of the Loan Company, to whom Davidson and the woman had mortgaged it in February, 1872, until the company sold to the defendant in March, 1876, who has had possession of it from that time until the present.

It was argued that, as the statute enacted that the per-

son who was in possession of the land should "have been dispossessed, or have discontinued such possession," and the right to bring the action to recover the land "shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession," that there was a difference in the operation of the Statute of Limitations when the owner was *dispossessed*, and when he *discontinued* his possession; that is, that when the owner discontinued the possession for twenty years he lost his title to the land, although no other person had been in possession of it in the meantime; but that, in the case of a dispossession, title was not lost unless the land was held for twenty years by another.

In *Doe d. Cuthbertson v. McGillis*, 2 C. P. 124, at p. 142, Sullivan, J., decided expressly against such a contention. He held that unless another person were in possession of the land which the owner had vacated, and acquired a title by a twenty years' possession, the owner did not lose his land, although he *discontinued* the possession of it.

The cases of *Doe d. Taylor v. Proudfoot*, 9 U. C. R. 503, and *Pringle v. Allen*, 18 U. C. R. 575, are opposed to the case of *Doe d. Cuthbertson v. McGillis*; but this latter decision is supported by *Smith v. Lloyd*, 9 Ex. 562, where it is said, and the opinion of Lord St. Leonards is adopted on the point, that "discontinuance of possession in the statute means an abandonment of possession by one person, followed by the actual possession of another person; for if no one succeed to the possession abandoned, there could be no one in whose favour, or for whose protection the Act could operate. To constitute discontinuance there must be both dereliction by the person who has the right and actual possession, whether adverse or not, to protect."

Lloyd v. Henderson, 25 C. P. 253, is a decision to the like effect, founded upon the same authority.

There are other cases to which I might refer, but it is not necessary to do so.

The result is, there is no difference in the effect, under the Statute of Limitations, in law between a *dispossession*

of the owner, and a *discontinuance* by the owner. The only difference is that discontinuance is the ordinary act of the owner. Dispossession is the forcible act of another against the owner. Land cannot be abandoned, as a mere chattel may be, to be seized by the first finder, or as an easement may be.

The possession, it has been said, which was held of the land from 1847 till 1853, was by the plaintiff's wife, and the two children she had by the plaintiff.

During that time there can be no doubt that her possession was his possession; the agency there is between husband and wife, for many purposes, continued during that period of his absence; and I am of opinion there can be no personal possession by the wife of the husband's land in his lifetime which can be adverse to the husband, or be otherwise than his possession.

She cannot, I think, disseise him by an actual ouster, so as to vest the title in herself, nor can she be a trespasser or wrongdoer upon his land, nor could he bring an action of ejectment or trespass against her. The unity of person of husband and wife, for these and for many other purposes, still continues, notwithstanding the late legislation in favour of married women holding and dealing with their own separate estates, as *femes sole*. But a wife may by feoffment to another of her husband's land disseise him, that is, it becomes the disseisin of the feoffee, because her feoffment is void: *Vin. Ab. "Disseisin,"* F. pl. 8.

The next enquiry is, whether when the wife married Davidson in 1853, and he went on the land and occupied it with her, and they continued that possession until 1875, as man and wife, that kind of possession and occupancy was of such a nature as to operate adversely or prejudicially to the plaintiff.

The second marriage of the wife determined her agency for her husband, the plaintiff: *Atkyns v. Pearce*, 2 C. B. N. S. 763.

In that case Cockburn, C. J., said: "Does not all the authority of the wife cease when she quits the husband's

roof and goes to live with another man? Is the adulteress still clothed with all the authority of a wife? The authority of the wife is derived from the conjugal relation: that tie severed, the authority ceases. The fact of her living in a state of adultery divests her of all authority which arises out of the marital relation."

A woman could not be convicted of stealing her husband's goods, although she went off with them in the company of a paramour.

That, however, is not because the agency continues, but because of the unity of person.

The agency is in such a case destroyed, so that if the paramour receives the goods from her, or helped her in taking them, he might be convicted of the larceny of them: *Regina v. Avery*, 5 Jur. N. S. 576; *Regina v. Berry*, 5 Jur. N. S. 228; *Regina v. Fitch*, 3 Jur. N. S. 524.

The woman could not have been convicted of bigamy—*The Queen v. Lumley*, L. R. 1. C. C. 196,—although she had married Davidson, and was cohabiting with him as his wife.

Was the possession by Davidson and his supposed wife after the marriage the possession of the two jointly, or the possession of the wife alone, or of Davidson alone?

If the possession of the wife alone, I think her possession would still be the possession of the plaintiff, her lawful husband, by reason of the continuance of the unity between them.

The possession of Davidson and the woman, after their marriage, was the possession of the two. He entered, and she admitted him, as having and claiming an interest in the land, by reason of the marriage, which they believed to be a lawful marriage; and, I think, after his occupation of the land for twenty years with her, he had acquired a title to the land of some kind, and to some extent, as against the plaintiff.

Davidson did not claim the land as his own, but as that of the woman. He claimed such right in it which he, as her supposed husband, had. That would be for the joint

lives of himself and the woman, and if he were the survivor, then for the further period of his own life, as tenant by the curtesy for his children of that marriage.

That is what he claimed for himself personally ; and he contended the land would go to his children after their mother's death. He also said he did not intend to give up the land to the plaintiff until he saw what right he had to it.

I was very much of the opinion for a time that, as Davidson claimed only in respect of his supposed wife, and as she could not claim against the plaintiff, her lawful husband, that neither could Davidson resist the claim of the plaintiff.

But I am of opinion that the title which Davidson set up was adverse from the very first to the right of the plaintiff. It was irreconcilably opposed to it, and even to his existence, and in no sense can it be said to have been, or to be, a recognition of his right.

Davidson was, from the first, a trespasser upon the land, and a disseisor of the husband, for the license of the plaintiff's wife to him to be there was not a sufficient license in law. She had no power to grant it as agent of her husband. That agency was gone, and she did not profess to act for or to bind him ; and having been there for more than twenty years, claiming right and title to the land for his life, not recognising but disputing the plaintiff's title, and claiming the land for his children after her death, he was, in my opinion, in a position to dispute the plaintiff's title after such twenty years' possession, and the defendant is entitled to the benefit of that limitation.

If the woman had made a lease for years to another, her husband, as he could enter upon the lands as against her, could enter also upon the tenant who claimed under her, so long as the tenant had not acquired a title contrary to the lease by length of possession.

If she had sold the land to another, and the purchaser had held the land for twenty years from her, he could hold it against the husband. If the woman had died soon after

the second marriage, and her second husband had remained after that twenty years in possession, the first husband could not disturb him.

So, if the second husband first entered on the land and lived there alone, say for ten years, and then the wife entered on the land, and the two lived there together for, say fifteen years, so that the second husband had been in possession more than twenty years, I do not think he could then be dispossessed by the first husband, although the period of limitation was made up partly by the joint occupation of himself and the plaintiff's wife.

If that be so, I do not see why the second husband, when he has been twenty years in possession, may not equally hold against the first husband, although the woman has been living on the land the whole time with her second husband, and is still living, and although the first husband may have the right of entry in respect of the wife's possession.

It does not follow that he can disturb the second husband's actual possession, which he had and claimed to have in himself, and which the wife could not interfere with.

If the wife had leased the land to another, the plaintiff might have ratified it, and might have notified the tenant to pay him the rent; but he could not ratify the second marriage, or the adultery committed by reason of it and under it. In that respect there is an important difference between the position and rights of the second husband and of a tenant claiming by lease from the wife.

Possession is a matter of fact. If two persons are living on land, the possession may be wholly in the one, and the right of occupancy, by his license, may only be in the other.

In such case the title will be wholly in the one having possession and property, or claiming it, and the other will have neither the possession nor property.

In this particular case, both the wife and the second husband had the possession. She claimed it, and he claimed it also, by reason of his being her husband, as he supposed.

He claimed it for his life and for the benefit of his child-

ren, and he said at the trial he did so. As his title was not disturbed for twenty years, and as the woman could not by any right she had eject him, and as her first husband can only enter upon such right or title after the lapse of twenty years possession against him, which she still had and another had not, he has not the power to do an act in respect of her which she did not herself possess.

There was probably here no forfeiture of dower by the woman in her first husband's estate, as she did not elope from him, but lived in his house with her second husband, and so her case is not within the statute. It was the first husband who abandoned her.

If she had left his house and gone elsewhere with her second husband, it appears she would have lost her dower to her first husband's estate : *Woodward v. Dowse*, 10 C. B. N. S. 722, and the cases in our own Courts following it. *Paynell's case*, Dyer, 107a ; 2 Inst. 435, 436; and *Coot v. Berty*, 12 Mod. 232.

Perhaps the first husband could not sue for a divorce in such a case, as he had virtually deserted his wife ; 1 *Bishop on Marriage and Divorce*, sec. 710, quoting from *Ayliffe* and referring to *Fraser's Domestic Relations*, 81, in the note. But see *Brown's Law of Divorce*, 26.

I do not conceive she could have proceeded against the first husband for a restitution of her conjugal rights after having lived with the second husband for thirty years and borne him children ; although it is possible, if he had deceived her by any positive act on his part, which led her to believe, and which was done to make her believe he was dead, she might, notwithstanding her long cohabitation with the second husband, have been able to compel a restitution of conjugal rights.

The case of *Joseph v. Joseph*, 34 L. J. P. M. & A. 96, may throw some light on this proposition.

Her legal rights towards the plaintiff, her legal husband, being such as I have stated and considered them to be by reason of his absence, and by reason of her second marriage, and by the long possession of the land jointly by her with

the second husband, do, in my opinion, enable the second husband to hold the land adversely to the first husband, so that he, or those representing him, cannot be ejected by the first husband.

That right was not to the sole possession, but jointly or equally to the enjoyment of that possession with the wife. The first husband must be entitled to recover the possession which his wife had. The first and second husbands will thus be, or in effect be, tenants in common of the land.

The mortgage which the second husband and wife gave of the land, conveying it as the freehold of the wife, does not operate by estoppel, as the first husband is a stranger to it, and therefore the whole of the circumstances may be considered.

As there was a special argument upon the question of estoppel, I have to say that I do not think it can be applied in this case against the first husband. At one time I thought it might be, and the reason of it was this. The plaintiff left the country voluntarily for about five years. While sailing on the lakes, and while he was on the adjoining shores of the United States, he was not very far from home, and could readily have returned to it. For the remaining twenty-five years he was in California. He was not a literate man, but he never sent any message, by letter or otherwise, to his wife or to his relatives. They did not know where he was, or whether he was living or not. He could have found them or communicated with them at any time. They could not find him or communicate with him. They had reason to believe and they believed he was dead, and he must have known they believed so, or he must have known that his conduct would naturally lead them to think so; and he must also have known that they would be likely to act towards him and his property as if he were dead.

If then they treated him as dead under these circumstances, and dealt towards him and his property as if he were dead, and his heiress-at-law sold his land as her own to a *bonâ fide* purchaser for value, the question was,

whether he should be allowed to dispute the validity of that sale, which was based upon a state of facts which his own conduct had brought about, induced and created. The rule of law is, "that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time": *Pickard v. Sears*, 6 A. & E. 469, 474.

There the mortgagee of chattels permitted the mortgagor to deal with them as his own, and he also carried on negotiations about these goods with an execution creditor of the mortgagor, who had seized them as the property of the mortgagor, without even telling such creditor of his claim as mortgagee; and he allowed the goods to be sold by the sheriff without forbidding it; and it was decided that he was concluded by his conduct from setting up his title to the goods, to the prejudice of the purchaser at the sheriff's sale. The word *wilfully* in the above passage is explained in *Freeman v. Cooke*, 2 Ex. 654, 663.

The rule also is "that if a man so conduct himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall afterwards be estopped from denying it," *per* Bramwell, B., in *Cornish v. Abington*, 4 H. & N. 549, 556.

The rule also is that an estoppel by negligence must be the "neglect of some duty cast upon the party who is guilty of it," and the neglect must be in the transaction itself, and be the proximate cause of leading the party into the mistake: *Swan v. North British Australian Co., Limited*, 2 H. & C. 175, 181.

Here the plaintiff made no representation of any kind. His conduct was of no positive act; it was that of neglect only, and there was no duty upon him to look after his property, or to find out what others were doing with it, and as he did not know what they were doing with it, or had done with it, he had nothing to counteract or to forbid.

If a person builds on the land of another, supposing it to be his own, and the owner, perceiving the mistake, abstains from setting him right and leaves him to go on in his error, the owner cannot afterwards assert his title to the land on which the money was expended by the other on the supposition that the land was the property of the one who had laid out the money.

It was the owner's duty actively to interfere and to assert his adverse title, and it would be dishonest of the owner, after remaining passive, to profit by the mistake which he could have prevented. But if one build on land knowing it not to be his, equity will not prevent the legal owner from claiming the land with all the expenditure made upon it: *Ramsden v. Dyson*, L. R. 1 H. L. 129, per Lord Chancellor, pp. 140, 141; per Lord Westbury, p. 168.

If the plaintiff had been informed of the second marriage, and of the second husband living on the land, or that his daughter was about to sell the land as her own, as the heir-ess-at-law of it, in the belief that the plaintiff was dead, and he could reasonably, by some act or means, have asserted his rights in due time, and he did not interfere, his case would be very similar to the one just referred to; and it seemed to me at one time it might be assumed against him on the evidence that the plaintiff was negligently, wantonly and wilfully keeping himself in a state of ignorance of a condition of things which he must have known would be very likely to take place after his long absence, and when he knew that all those interested in him must have believed, and had every reason, from his own conduct, to believe he was dead; and that, as against him, it might be assumed he was wilfully abstaining from putting forward his claims, knowing, as it might be assumed, that others were dealing with his land, and knowing also, as it might be assumed, they had a right to do so.

But I am not prepared to say he was bound to tell where he was, or that he was still living, or that he was bound to look after his rights or property, or to inform himself whether others were dealing with them or not,

at any further risk than that of losing them by the law of limitations.

If he had by any act or device led it to be believed he was dead, and had resorted to such act or device with the intention of having it so believed, and he kept away or concealed himself for that purpose, and it was accordingly believed he was dead, then I think the sale by his daughter would, in this case, have been a valid act, whether he had previous knowledge of such sale or not, and whether he could have prevented it or not, so long as he did not in fact prevent it, when he could have prevented it.

There have no doubt been many cases of such concealment or misrepresentation, and some of them very singular cases : *Trew v. The Railway Passengers Assurance Co.*, 6 Jur. N. S. 759, 5 H. & N. 211, 6 H. & N. 839 ; the opinion of Pollock, C. B., at p. 760 of 6 Jur. N. S., as to what he supposed was the case ; *Joseph v. Joseph*, 34 L. J., P. M. & A. 96 ; *Hoig v. Gordon*, 17 Grant 599 ; and the very extraordinary case mentioned as a fact, and which I presume to be so, in the 9th vol. of Household Words, p. 327, and 1st vol. of Cassell's Magazine, p. 236, and also shortly referred to in Tomb's Curiosities of London. Other cases might also be referred to.

While I am not able to attach any legal duty upon the plaintiff to conclude him by estoppel, I am of opinion he is bound by length of time so far as Davidson's interest is concerned, and I should not have regretted it if he had been bound altogether, because he has caused, whether intentionally or not, by his conduct, which seems to be as inexplicable as it is inexcusable, a degree of distress to his wife and an amount of injury to the children she has had by the second marriage, which can never be removed ; and he has also done as much as in him lay to bring a heavy pecuniary loss upon those who have lent money upon or have bought the land in good faith, and who no doubt thought that it was not possible a man could act as the plaintiff has done, or that he could, if he did so act, recover the land from an innocent purchaser.

ARMOUR, J.—The defendant's counsel in the argument put this question, as I understood him, "Is the possession by the wife of the husband's lands in law, under every state of circumstances, the possession of the husband?" and he admitted that if this question must be answered in the affirmative, there was an end of the defence to this suit.

I am of opinion that it must be so answered, but is not necessary to answer in the affirmative a question quite so wide as that put by the learned counsel in order to determine this suit in the plaintiff's favour. It is sufficient if the following question is answered in the affirmative, and I think it must be so answered, "Was the possession by the wife of the land in question in law, under the state of circumstances in this case, the possession of her husband?"

It seems to me that the doctrine that the possession by the wife of the husband's lands is to be deemed the possession of the husband, depends rather upon the principle that the husband and wife are regarded as one person in law than upon any ground of agency.

If I am right in this, then the husband, the plaintiff, was never out of possession until his wife was ejected in 1874.

Assuming, however, that this doctrine is founded upon the agency of the wife, I think, in that case, that it is an agency cast upon her by law by virtue of her marriage, and such an agency as she cannot divest herself of without her husband's consent.

Upon her adultery the husband is entitled to disaffirm and repudiate her agency; but he is in no way bound to do so, he may affirm and assert it. So far as the circumstances of this case are concerned, I do not see that the plaintiff has ever done anything, nor has anything ever been done by any one else, nor has anything ever happened, to disentitle him to assert and affirm in law, "This is my land, and this is my wife, and this my wife has been in possession of this my land, and her possession is my possession."

This being so, the possession of Davidson amounted to

nothing ; for where two persons are in possession of land, the law adjudges it to be the possession of the one who hath the right : *Reading v. Royston*, Salk. 423, S. C., 2 Lord Raymond 829.

Besides all this, I do not think^s that we should strive to give the possession of Davidson a higher character than he gives it himself in his evidence, when he says that he never claimed this land as his own : that he claimed it as his wives and children's, for it was an uncertain thing whether the plaintiff would come back or not : it was the report one day that he was alive, and one day that he was dead : that he never made any claim to the land as his own property : that he considered that it might be his wife's and children's : that he treated it in that way : that he was not satisfied whether the plaintiff was dead or alive : that the plaintiff's friends were telling him that the plaintiff would come home, and so he would not make any improvements on the land : that he just lived on it.

I think that if we held after this, his evidence, that Davidson had acquired by such a possession a statutory title to the land in question, we would be "putting," to use the words of an eminent Judge, "an estate into him in spite of his teeth" : *Ventris, J., in Thompson v. Leach*, 2 Ventris 198.

I think the rule should be discharged.

Rule discharged.

BROWN v. MORROW.

*Will—Sufficiency of search for—Memorial executed by heir-at-law—
Declaration against interest—Evidence.*

In ejectment, in proof the existence of a will, one H. swore that she saw the will, giving an explicit statement of its contents, and it also appeared that the devisees, of whom the heir-at-law was one, all submitted to and acted upon it:

Held, sufficient evidence of the existence of the will.

Held, also, that the will was sufficiently proved by the execution and registry by the heir-at-law of a memorial of the will, it being a declaration against his proprietary interest, and he being dead at the time of the trial.

Semble, it was, on this ground, good primary evidence not only against the heir-at-law and those claiming under him, but against third parties. It appeared that search for the will was made in the office in which it would have been had it been admitted to probate; in the different registry offices of the counties in which the several parcels of land, of which the testator died seised, were situate; among the papers of the owners of the several parcels; among the papers of the only executor of three named in the will who could be found; among the papers of the draftsman of the will, and among those of several of the devisees:

Held, sufficient to let in secondary evidence of the will.

Held, also, that plaintiff's case was within sec. 26, Ch. 51, R. S. O., under which they had served notice.

Ejectment for the east half of lot 20, in the 7th concession of Adjala.

The plaintiff, Brown, claimed title as grantee of George Middleditch, Harriet Middleditch, and Philip Middleditch, three of the heirs-at-law of Frances Middleditch, and the other plaintiffs claimed as the other heirs-at-law of the said Frances Middleditch, who was the devisee of James Bell, who derived title under the grantee of the Crown. The plaintiffs also claimed title by a second mode, differing only from the first in alleging Frances Middleditch to be the heiress-at-law, instead of devisee, of James Bell.

The defendant, besides denying the plaintiff's title, claimed title by length of possession.

The cause was tried before Patterson, J. A., without a jury, at the last Barrie Assizes.

The case turned wholly on the sufficiency of the proof of the plaintiff's title, the defendant shewing no title.

The patent from the Crown was put in, granting the land in question, on the 23rd March, 1831, to Jesse Targwill; and

a conveyance was put in, which proved itself, dated the 29th day of June, 1831, from Jesse Targwill to James Bell, of the town of York, innkeeper.

It was proved that this James Bell died on the 31st day of July, 1832, and his wife about three months after : that he left three children, James Bell, the younger, Elizabeth Bell, and Frances Bell : that James Bell, the younger, died unmarried and intestate since the commencement of this action : that Elizabeth married one Horsley, and was then his widow, being still alive : that Frances married one Henry Middleditch, by whom she had five children, George, Harriet, Philip, Benjamin, and Walter, the two latter being two of the plaintiffs ; and conveyances from the three former to the plaintiff Brown, prior to the commencement of this suit, were put in and proved : that Frances Middleditch and her husband both died some years ago, and that James Bell died seised of three hundred and fifty acres of land, one hundred acres in Oro, one hundred acres in Caledon, the land in question ; and fifty acres in Otonabee.

The learned Judge entered a verdict for the plaintiff.

The facts are further stated in the judgment.

On May 23, 1878, *McCarthy*, Q. C., obtained a rule *nisi* to enter a verdict for the defendant, pursuant to the Law Reform Act, on the ground that the plaintiff failed to establish the title of the grantees of either the devisees or the heirs-at-law of James Bell, the grantee of the patentee. (1) Not as heirs-at-law, because it was established in evidence that the said James Bell, through whom the plaintiff claimed, died testate, and consequently his estate passed to his devisee or devisees, and title could not be derived through his heir or heirs-at law. (2) And because there was no evidence of the said James Bell having been married, or of Francis Bell, through whom title was attempted to have been made, being in fact his heir-at-law. (3) Not as the grantees of the devisee, because the will of said James Bell was not proved. (4) The alleged secondary evidence thereof was erroneously admitted, the execution of the alleged will

not having been proved, and even if proved, its loss not having been established. (5) Because the secondary evidence, even if admissible, did not establish the contents of the will. (6) And on the ground, that the plaintiffs were not, under the circumstances proved, entitled to avail themselves of the clauses of the Ejectment Act respecting vexatious defences without merits, or if entitled, their case was not one within the said clauses.

On May 30, 1878, *Ferguson*, Q. C., and *Watson*, shewed cause. James Bell was the grantee of the patentee. The title is registered down to James Bell. There was possession; the land was wild land, and there was a constructive possession. The Vendors and Purchasers' Act (R. S. O. ch. 109,) applies to all land, wild or improved: *Heck v. Knapp*, 20 U. C. R. 360; *Casselman v. Hersey*, 32 U. C. R. 333; *Davis v. Henderson*, 29 U. C. R. 444; *Heyland v. Scott*, 19 C. P. 165, 172.

If the Act be restricted to actual possession, it will be inoperative in many cases. The 31 Vic. ch. 20, sec. 33, sub-sec. 3, applies to wills. The will is an instrument under the Registry Act.

Primâ facie, the heir-at-law is entitled to recover, and there is no will proved so as to divest the heir. There is an assertion of one, but no proof of it. He further referred to *Armstrong v. Little et al.*, 20 U. C. R. 425; *Thompson v. Bennett*, 22 C. P. 393; *Thompson v. Hall*, 31 U. R. 367.

There is a moral certainty of the plaintiff's right. The Judge was satisfied with the diligence of the search.

McCarthy, Q.C., contra. So much is proved about the will, that it ought to be produced before the plaintiff is entitled to possession: *Doe Atkinson v. McLeod*, 8 U. C. R. 344; *Hubback* on Succession, 64. There is no presumption of intestacy.

The Vendors' Act does not apply. There is less proof of the will than of the deed. The Judge did not rule as to the sufficiency of the search. He further cited *Doe Morgan v. Simpson*, 5 O. S. 555; *Hunter v. Farr et al.*, 23 U. C. R. 324; *Pearce v. Hooper*, 3 Taunt. 62.

June 29, 1878. ARMOUR, J.—If there was sufficient evidence of the existence of a will of James Bell, and of a search unsuccessfully made for it in the place or places where it was most likely to be found, sufficient to let in secondary evidence of its contents, it was clearly proved that James Bell devised the one hundred acres in Caledon to his own son, James Bell, the younger, in fee, the one hundred acres in Oro to his daughter, Elizabeth Bell, now Elizabeth Horsley, in fee, the one hundred acres in question to his daughter, Frances Bell, afterwards Frances Middle ditch, in fee, and the fifty acres in Otonabee to his wife Elizabeth, in fee.

Elizabeth Horsley's evidence, taken under commission and read at the trial, shewed this, and shewed that she had sold the land devised to her, that her brother James had sold the land devised to him, and in fact that she and her brother and sister had acted upon and submitted to to the will as validly devising the lands purporting to be thereby devised.

This being so, the only questions are: 1. Was there sufficient evidence of the existence of a will of James Bell? 2. Was there a search unsuccessfully made for the will in the places where it was most likely to be found, sufficient to let in secondary evidence of its contents.

Both these questions must, in my opinion, be answered in the affirmative. The evidence of Mrs. Horsley that she saw the will, and her explicit statement of what it contained, and the fact that the devisees, the heir-at-law being one, all submitted to and acted upon the will she describes, in my opinion, sufficiently establishes the existence of such a will: *Doe v. Whitcomb*, 6 Ex. 601, S. C. 4 H. L. 431; *Ansley v. Breo*, 14 C. P. 371; *Dickson v. Macfarlane*, 22 U. C. R. 539. I think also the existence of the will was sufficiently proved by the execution and registry by the heir-at-law of the memorial proved at the trial, it being a declaration against his proprietary interest, and he being dead at the time of the trial.

The sufficiency of the search for a lost writing, in order

to let in secondary evidence of its contents, is a question to be determined by the Judge at the trial, upon his being satisfied that a reasonable presumption of the loss of the writing has been raised by the proof of the search made for it. It is a mixed question, however, of law and fact, which the Court can subsequently review. The learned Judge, at the trial of this cause, was satisfied, by the proof of search, that such a presumption was raised, and accordingly admitted the secondary evidence, and in this I think he was right.

Search for the will was proved to have been made in the offices of the Court where the will would have been, had it been admitted to probate, in the different Registry offices of the counties in which the several parcels of land of which the testator died seised are situate, and among the papers of the present owners of these several parcels of land, and among the papers of the only executor of those named in the will who could be found, and among the papers of the lawyer who drew the will, and among the papers of Henry Middleditch, and of his wife, of Mrs. Horsley, and of James Bell, the younger. I think the plaintiffs shewed that they had, in good faith and with due diligence, exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to them, and had searched in all those places where the will ought properly to be. It was suggested at the trial, and urged before us, that because an entry was found in a book in the Registry Office at Barrie, that the will there registered had been given to one Johnson for one Thomas Bell, search ought to have been made among the papers of some Thomas Bell for it. I suspect Thomas Bell was a mistake for James Bell, to whom the will belonged, no Thomas Bell being shewn to have had any right to the custody of the will, in any way, or to have had anything to do with the registry of it, or otherwise. I think such a search was unnecessary.

The will, if produced, would have proved itself, and as a fact all the witnesses to it were dead.

I am inclined to think, although not free from doubt on this point, that the memorial of the will, executed by James Bell, the younger, who was the heir-at-law of James Bell, and who would, but for the will, have been entitled to the land in question, and would have been in constructive possession of it, the land being wild land, was good primary evidence, not only against James Bell and those claiming under him, but against third parties, James Bell being dead at the time of the trial, as a declaration against his proprietary interest: *Taylor* on Evidence, 6th ed., ch. 11; *Russell v. Fraser*, 15 C. P. 375; *Rogers v. Card*, 7 C. P. 89.

I am, however, clear that this and all the other facts proved, taken together, furnished sufficient secondary evidence of the will of James Bell, and of its contents. There is no ground for the claim made by the plaintiff, that Frances Middleditch was heiress-at-law of James Bell, for James Bell, the younger, was alive at the commencement of this suit.

The defendant was served with a notice under the Revised Statutes, ch. 51, sec. 26, and I think that the evidence of title given by the plaintiff is sufficient to satisfy us that the plaintiffs are entitled, in justice, to be regarded as the proprietors of the land in question, and that their inability to shew a perfect legal title, (in case they have not done so, which I think they have), arises from a cause not within the power of the plaintiffs to remedy by using due diligence, and that the plaintiffs are, on this ground, entitled to recover against the defendant, who shews no title.

The rule should be discharged.

HARRISON, C. J., concurred.

Rule discharged.

DILLAREE V. DOYLE.

Gratuitous loan—Increase.

In the case of a gratuitous loan all the increase and offspring of the loan, and everything accessional to it (in this case a pair of mares, offspring of a mare loaned, and portion of a set of harness acquired as payment for the use of oxen,) belong to the lender, and must be returned at the determination of the loan, and are not subject to seizure under execution against the bailee.

THIS was an action to recover damages for the seizure and conversion of one pair of mares, one waggon, and one set of harness.

Pleas: not guilty, and denial of plaintiff's property.

The case was tried by Patterson, J.A., at the last Simcoe Assizes, who entered a verdict for the plaintiff for \$40, the value of the waggon, and assessed the value of the mares at \$200, and of the harness at \$8, in order that the verdict might be increased by their value, in case the Court should be of opinion that the plaintiff was entitled to recover in respect of them.

The following was the only evidence given at the trial material to be considered:

Plaintiff said:—"The horses in question are two mares. I owned their mother and raised the colts. I got the mother from John Langs. I also owned the waggon, a light lumber waggon; also the harness: it was part bought from Daniel Jackson, and part made up from harness we had on the place. George William Fish is my brother. He had the property as my agent in 1873. He lived on my farm, at Turkey Point, with his family. I lived in Buffalo, but now live on the farm at Turkey Point. My brother was a dissipated man. I bought the farm for a home for his family, and I stocked the farm for their use, amongst other things, the mare from Mr. Langs, in 1862. I often came over to see my brother, and sent him money for his use."

Cross-examined:—"My brother did not, to my knowledge, claim the property as his. The harness was taken from Jackson in payment for the use of my oxen: it was arranged by my brother."

Henry W. Fish, son of George Fish, said :—"I live on aunt's place, at Turkey Point. The colts were raised of the mare she got of Mr. Langs. I always heard the other things, viz., waggon and harness, belonged to aunt. The defendant took the horses, waggon and harness. I was there, and my mother and brother-in-law. My mother forbade him taking them, and said they belonged to the plaintiff."

Cross-examined :—"I never heard my father say the things belonged to him."

Robert James Fish, son of George Fish, said :—"I live at Turkey Point, on the plaintiff's place. The horses, waggon, and harness belonged to plaintiff. The team was raised on the place. The mother belonged to the plaintiff; she got her from Mr. Langs."

Cross-examined :—"I heard my father and mother say the property belonged to the plaintiff; I never heard my father say they belonged to him."

Anna Maria Secord, daughter of George Fish, said :—"I lived on plaintiff's farm, at Turkey Point. The mares, waggon, and harness belonged to the plaintiff. I always understood everything on the place belonged to her, and I knew also she was accustomed to send money to my father."

Cross-examined :—"I saw the colts raised on the place. He always said they were plaintiff's."

John Langs said :—"I knew the plaintiff's farm. I knew the mares that were seized. I sold the mother of them to the plaintiff. The colts were raised on the farm."

Cross-examined :—"It must have been seven or eight years before 1873 that I sold the mare to the plaintiff. They were always on the place. Plaintiff lived on the place for a while, and then went to the other side."

Daniel Jackson said :—"I knew the mares ever since they were colts. I raised the mother of them. She was sold to Mr. Langs. The colts were raised on the place. Mr. Fish got part of the harness from me. The sale was in June, 1873. The plaintiff bought part of the place from my father."

Cross-examined :—"Fish bought the harness and traces from me for the use of his oxen for five days."

Defendant said :—"I am bailiff of the Division Court. I seized it under executions against Fish. I seized the goods on Turkey Point, in George Fish's actual possession. He was using them. I had known the horses two or three years. Fish always had them. After I seized he gave me a notice that they belonged to the plaintiff."

May 23, 1873. *Spencer* obtained a rule *nisi* to increase the verdict by the sum of \$208, on the ground that the plaintiff was entitled to recover for the value of the horses and harness.

June 5, 1878. *Campbell* shewed cause, citing *Bac. Ab. Leases, A* ; *Lett v. Commercial Bank of Canada*, 24 U. C. R. 552.

Spencer, contra, cited *Woodf. L. & T.* 73, 74 ; *Putnam v. Wyley*, 8 John. N. Y. 432 ; *Bl. Com.* 404.

June 29th, 1878. ARMOUR, J.—The question to be determined by the Court is, whether the property in question was at the time of its seizure the property of the plaintiff.

I am of opinion that the plaintiff is entitled to have his verdict increased by the value of the mares and harness.

Sir William Blackstone says, in discoursing of property in things personal : "Of all tame and domestic animals the brood belongs to the owner of the dam or mother, the English law agreeing with the civil, that *partus sequitur ventrem*, though for the most part, in the human species, it disallows that maxim. And, therefore, in the laws of England, as well as Rome, *si equam meam equus tuus pregnantem fecerit non est tuum sed meum quod natum est*. An exception to this rule is in the case of young cygnets, which belong equally to the owner of the cock and hen, and shall be divided between them."

Again he says : "By the Roman law, if any given corporeal substance received afterwards an accession by

natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by the right of possession to the property of it under such its state of improvement. And these doctrines are implicitly copied and adopted by our Bracton, and have since been confirmed by many resolutions of the Courts;" and this is called property arising from accession. See also *Kent's Commentaries*, Lecture 36.

Under ordinary circumstances, therefore, the property in the mares in question would be in the plaintiff, who was undoubtedly the owner of the mare from which they were bred.

Was there anything, then, in the nature of the use the plaintiff gave to her brother of the mother of these mares to make her offspring the property, in law, of the brother? I think not.

It is, in my opinion, needless to enquire what would have been the effect on the property in the offspring if the plaintiff had leased or let the mother to Fish, *for rent or hire*, for the present is not a use of that sort, but is the case of a mere gratuitous loan, and that, too, of the lowest or most precarious kind, for it was for no certain time, but merely at the will of the lender.

This sort of bailment was called in the Roman Law *Commodatum*: "*Commodata autem res tunc proprie intelligitur, si nullâ mercede acceptâ vel constitutâ res tibi utenda data est; gratuitum enim debet esse commodatum. Is cui res aliqua utenda datur, id est, commodatur re obligatur;*" and if the *commodatum* was for an indefinite time, but at the mere pleasure of the lender, it was called *precarium*: "*Precarium est quod precibus petenti utendum conceditur tamdiu quamdiu is qui concessit patitur. Qui precario concedit sic dat quasi tunc recepturus cum sibi libuerit precarium solvere.*"

Lord Holt, in the well-known case of *Coggs v. Barnard*, defines this sort of bailment to be, "where goods or

chattels that are useful are lent to a friend gratis to be used by him."

A bailment of this kind is also strictly personal and confined to the borrower.

"By the Roman law the lender still retains the sole proprietary interest, and nothing passes to the borrower but a mere right of possession and user of the thing during the continuance of the bailment. Nay, the possession of the borrower is deemed the possession of the lender: '*Rei commodatæ et possessionem et proprietatem retinemus. Nemo enim commodando rem facit ejus cui commodat.*'"

"Such is the doctrine of the Roman law, as well as the continental jurisprudence founded on it in modern times. The same rule seems to prevail in the common law, so that an action for a trespass or conversion will lie in favour of the lender against a stranger who has obtained a wrongful possession, or has made a wrongful conversion of the thing loaned. A mere gratuitous permission to a third person to use a chattel does not, in the contemplation of the common law, take it out of the possession of the owner, so as to prevent him from maintaining an action for any injury to it, or for any conversion of it, by a third person:" *Story on Bailments*, 8th ed., sec. 279; *Lotan v. Cross*, 2 Camp. 464.

All the increments and offspring of the thing loaned and everything that is accessional to it belong to the lender, and stand precisely in the same position, as to the property, possession and otherwise, as the thing itself, and must be returned to the lender at the determination of the bailment.

That part of the harness bought by the use of the plaintiff's oxen would seem also to belong to the plaintiff, the more so as it was an accession to that part already owned by her.

It is also to be observed that the bailment in the present case was for the use of the family, and not for the use of Fish alone; and that, so far as intention could govern, the intention both of bailor and bailee was that the property in question should belong to the plaintiff.

The rule should therefore be made absolute to increase the verdict by the sum of \$208.

See the case of *Swan's*, 7 Coke 86 ; *Story* on Bailments, 8th ed., ch. 4 ; *Kent's Commentaries*, Lecture 40 ; *Coggs v. Bernard*, 1 Smiths L. C., 5th ed. 171 ; *Jones* on Bailments ; *Bacon's Ab. Title, Bailment* ; *Wood v. Ash*, Owen 139 ; *Putnam v. Wyley*, 9 Johns. Rep. 432 ; *Merritt v. Johnson*, 7 Johns. Rep. 473 ; *Broom's Commentaries*, 838.

HARRISON, C. J., concurred.

Rule absolute to increase verdict by \$208.

THE BANK OF TORONTO V. NIXON ET AL.

Partnership—Registration under R. S. O. ch. 123—Note signed by retiring partner—Non-registration of new partnership—Renewal note signed by continuing partner in name of old partnership—Liability of retiring partner.

Before the retirement of one of the members of a partnership, he signed certain notes in the name of the firm payable to the plaintiffs, creditors of the firm. A renewal note was subsequently signed by one of the continuing partners in the name of the old firm, which had been duly registered under the "Registration of Co-partnership Act, 1869" (R. S. O. ch. 123), but no declaration of the dissolution of the old or of the formation of the new firm under its different name was ever registered :

Held, that the retiring partner was liable on the note, as he could not, in consequence of the failure to register the change or alteration in the firm, be deemed to have ceased to be a member of the old firm, which still existed so far as this liability was concerned.

Seemle, that the dissolution mentioned in sec. 4 (sec. 7, R. S. O.) refers to the dissolution and winding up of the business, not to a case of continuance of the business, with a change in the membership and name of the partnership.

ACTION on a promissory note for \$914.25, dated the 15th of November, 1875, with interest at seven per cent., pay-

able two years after date to the order of Thomas Nixon & Son, and purporting to be made and endorsed by "Thomas Nixon & Son."

The defendant James Bower Nixon suffered judgment by default, and the defendant Thomas Nixon pleaded that he did not make, that he did not endorse, and that he paid the said promissory note.

The case was tried at the last Assizes at Milton, before Gwynne, J.

The making and endorsing of the note were proved to be in the handwriting of the defendant James Bower Nixon, a son of the defendant Thomas Nixon, but his authority to bind his father by so making and endorsing was disputed.

The defendants entered into co-partnership on the 1st of October, 1869, as wool dealers, wool pullers, and general commission merchants, at the city of Toronto, under the name of "Thomas Nixon & Son," and on the 4th of July, 1870, duly registered a declaration, signed by each of them, of such co-partnership, under the "Registration of Co-partnerships Act, 1869," and continued to carry on such business under the said name until about the 17th day of November, 1873, when a change or alteration in the membership of the said partnership took place, by the defendant Thomas Nixon retiring from the said partnership, and one James Walsh coming into it, and a change or alteration of the partnership name was made from "Thomas Nixon & Son" to "Nixon & Company," but the same business was continued to be carried on by the new firm as had been carried on by the old; and it was a stipulation with the plaintiffs, on the formation of the new firm, that the new firm should have the same line of discount at the plaintiffs' bank as the old firm had, and that the defendant James Bower Nixon should draw sufficient money out of the new firm to pay the liabilities of the old, which liabilities were confined to two creditors only, the plaintiffs and one Neil Johnson.

No declaration of this change or alteration in the membership of the partnership and in the partnership name was ever registered.

About a fortnight before the defendant Thomas Nixon retired from the firm of "Thomas Nixon & Son," that firm was indebted to the plaintiffs in the sum of \$4,257.39, and it was agreed between the plaintiffs and that firm that time should be given for the payment of such indebtedness, and accordingly the plaintiffs accepted the three promissory notes of the firm (the defendant Thomas Nixon signing the firm's name to them), each for the sum of \$1,419.13, payable at one, two, and three years respectively; and the note sued upon was given in renewal for a part of the last two of these notes.

The contention of the defendant Thomas Nixon was, that the firm of "Thomas Nixon & Son" was dissolved two years before the note sued upon was given, and that it was signed and given by the defendant James Bower Nixon without his authority; and that the defendant James Bower Nixon had no authority to sign the name of the firm "Thomas Nixon & Son," which had theretofore been dissolved; and that he, Thomas Nixon, was in no way bound thereby.

The plaintiffs, on the other hand, contended that the defendant Thomas Nixon signed the declaration of co-partnership of "Thomas Nixon & Son:" that no declaration of the change or alteration in the membership of such co-partnership, effected by the defendant Thomas Nixon retiring from it and James Walsh coming into it, and of the change of the partnership name from "Thomas Nixon & Son" to "Nixon & Company" was ever registered, and therefore that the defendant Thomas Nixon "is not to be deemed to have ceased to be a partner" in the firm of "Thomas Nixon & Son;" and the promissory note sued on having been given for a liability of that firm, he was bound thereby.

A verdict was found for the defendant.

Biggar, May 23, 1878, obtained a rule *nisi* to set aside the verdict and enter it for the plaintiff, on the law and evidence, there being no evidence to warrant a finding that the partnership of Thomas Nixon & Son was dissolved

when the note was made, or, if so dissolved, that the plaintiffs had notice of the same when they took the note, or agreed not to look to defendant Thomas Nixon for payment of the debt in part represented by said note; and that there was no evidence to sustain the plea of payment; or to strike out the name of the defendant James Bower Nixon, and to enter a nonsuit.

June 1, 1878, *F. Osler*, shewed cause. The business was not one that authorized one partner to sign notes in the name of the firm: *Pollock* on Partnership, ch. 7, p. 70; *Lindley*, 2nd ed., p. 412. Then as to the statute, see Rev. Stats. O., Ch. 123. When the note was given the case of dissolution was not provided for. It is not compulsory to register a dissolution when there is a mere change of partners. No consequences are stated to arise from the omission to sign such a declaration. Besides, actual notice should debar a person from taking advantage of the statute.

M. C. Cameron, Q. C., contra. Thomas Nixon was still a member of the firm. There was only a change in style. No dissolution was registered, and the defendant knew that his name was continued, and made no objection. Hague's knowledge of the change in Thomas Nixon's position with regard to this debt is not sufficient to dispense with compliance with the statute: *Swire v. Redman*, L. R. 1 Q. B. 536.

C. R. W. Biggar, on the same side. The only question is, whether the registered firm of Thomas Nixon & Son is dissolved. According to the statute it is not, (Rev. Stat. O. ch. 123, sec. 6,) and the defendant cannot be heard to say that the declaration he signed is not true. As to actual knowledge on the part of the plaintiffs, Hague says he did not know the firm was dissolved. He cited *Lindley* I., last ed., pp. 447-8; *Kirwan v. Kirwan*, 2 Cr. & M. 617; and as to nonsuit, *Greaves v. Humfries*, 4 E. & B. 851.

June 29, 1877. ARMOUR, J.—It is quite clear upon the evidence that, unless the plaintiffs' contention is correct,

and the defendant Thomas Nixon is made liable to pay the promissory note sued on, by virtue of the provisions of the "Registration of Co-partnerships Act, 1869," he is not otherwise liable to pay it in this action.

That Act was passed on the 24th of December, 1869, and by its preamble recites that "it is expedient to remove the difficulties that exist in bringing actions against persons associated as partners for trading purposes, or against unincorporated companies or societies formed for like purposes."

Sec. 1 provides "That all persons who at the time of the passing of this Act, or who hereafter may be associated in partnership for trading, manufacturing or mining purposes, shall cause to be delivered to the registrar of the county, city or riding in which they carry or intend to carry on business, a declaration in writing, signed by the several members of such co-partnership."

Sec. 2 provides the requisites of such declaration.

Sec. 3 provides, "That the said declaration shall be filed within six months after the passing of this Act, if such partnership shall have been, or shall be, formed before the time when this Act shall come into force and effect; and within six months next after the formation thereof, if it shall be formed after the said Act shall come into force and effect; *and a similar declaration shall in like manner be filed when and so often as any change or alteration shall take place in the membership of such partnership, or in the name, style, or firm under which they intend to carry on business, and place of residence of each member of said firm*".

Sec. 4 imposes a penalty upon each and every member of any partnership failing to comply with the requirements of the Act.

Sec. 6 provides that "the allegations made in the declaration aforesaid shall not be controvertible as against any party by any person who shall have signed the same, nor as against any party not being a member of the partnership by any person who shall have signed the same, or who was really a member of the partnership therein mentioned at the time such declaration was made."

And sec. 7 provides that "*until a new declaration shall have been made and filed by him or by his co-partners, or any of them, as aforesaid, no such signer shall be deemed to have ceased to be a partner : such new declaration shall state such alteration in the partnership.*"

On the 2nd of March, 1872, "An Act to further provide for the regulation of co-partnerships, and of other business firms," was passed, and on the 29th of March, 1873, "An Act to amend the Acts regulating the registration of co-partnerships and of other business firms," was passed, sec. 4 of which Act provides that "upon the dissolution of any partnership, any or all of the persons who composed such partnership may sign a declaration certifying the dissolution of the partnership. Such declaration may be in the form of the schedule hereto, and the registrar shall, upon payment of the like fees, register every such declaration delivered to him in the same book and in the same manner as it is his duty to register declarations made under the said Acts, and he shall also enter every such declaration in the Firm Index Book."

It seems to me that the "dissolution" mentioned in the last recited Act has reference to the case where the partnership is dissolved and the partnership business wound up, and not to such a case as the present, in which the partnership business is continued with a change or alteration in the membership of the partnership, and with a change or alteration in the partnership name.

No declaration, however, of the dissolution of the partnership of "Thomas Nixon & Son," was ever registered, nor was any declaration of the partnership of "Nixon & Company" ever registered.

It comes then to this, that the defendant Thomas Nixon is a signer of the declaration of co-partnership of "Thomas Nixon & Son:" that he cannot controvert, nor does he seek to controvert any of the allegations therein: that a similar declaration should have been filed when the change or alteration took place in the membership of that firm by the defendant Thomas Nixon retiring and James Walsh

coming in, and when the change or alteration took place in the partnership name from "Thomas Nixon & Son" to "Nixon & Company:" that no such declaration has been filed, and therefore the defendant Thomas Nixon cannot be deemed to have ceased to be a partner in the firm of "Thomas Nixon & Son;" nor, for like reasons, can the defendant James Bower Nixon be deemed to have ceased to be a partner in the firm of "Thomas Nixon & Son;" and thus that firm still exists, so far as this liability is concerned, and the defendant James Bower Nixon had authority to make and endorse the note sued on in this action.

The rule should therefore be made absolute to enter a verdict for the plaintiffs for the amount of the note sued on, with interest.

Had we come to a different conclusion, we would have made that part of the plaintiffs' rule absolute which seeks to strike out the name of the defendant James Bower Nixon, and to enter a nonsuit (see *Greaves v. Humfries*, 4 E. & B. 851), in order to give the plaintiffs an opportunity to apply the law as laid down in *Swire v. Redman*, L. R. 1 Q. B. Div. 536, to the defendants.

HARRISON, C. J., concurred.

Rule absolute.

McEDWARDS v. McLEAN.

Insolvent law—Distress for rent—Sale of goods—Action by assignee—Plea alleging goods plaintiff's—Pleading.

In an action by plaintiff, describing himself as "the official assignee of the estate and effects of M. according to the statute in force concerning insolvents," against defendant, for a wrongful sale of goods seized by him under a distress warrant: *Held*, that a plea denying the goods to be the goods of the plaintiff as such assignee, did not put in issue the plaintiff's official character as assignee.

Where the landlord distrained for six months' rent while the goods were in the tenant's possession, and afterwards, the goods being in the hands of the bailiff, an attachment in insolvency issued against the tenant: *Held*, that the assignee was not entitled to the goods, without paying or tendering the rent, and that not having done so, the landlord was entitled to proceed and sell.

Mason v. Hamilton, 22 C. P. 411, distinguished.

The declaration was as follows: James McEdwards, the official assignee of the estate and effects of W. D. McColl, according to the statute in force concerning insolvents, by Peter McCarthy, sues James McLean:

1. For that the defendant, before the said W. D. McColl was divested of his debts, estate, and effects, under the said statute, converted to his own use, and wrongly deprived the said W. D. McColl of the use and possession of goods which were then of the said W. D. McColl, that is to say, one horse, one waggon, &c., &c.

2. And for that the defendant, after the said W. D. McColl was divested of his debts, estate, and effects, under the said statutes, converted to his own use, and wrongfully deprived the plaintiff, as such assignee as aforesaid, of the use and possession of goods which then were of the goods of the plaintiff, as such assignee as aforesaid, (setting out the goods).

There was a third count for money payable, money received, for interest, and account stated.

Pleas: 1. Not guilty. 2. Denial that the goods were the goods of said McColl. 3. Denial that they were the goods of the plaintiff, as assignee, as alleged. 4. Never indebted. 5. Payment.

6. That before the alleged conversion the said McColl held

certain premises, as tenant, under lease, at a yearly rent of \$325, and taxes, payable quarterly, and two quarters of said rent were then due and in arrear, whereupon defendant, whilst said arrears remained so due, entered into the premises and distrained and sold the goods of said McColl there found, as a distress for such arrears, &c.

7. That, by the terms of said lease, if said McColl should become insolvent, the lease was to become forfeited and void, and the then current quarter's rent should be at once due and payable; and said McColl did, on the 15th May last, become insolvent within the meaning of said lease, and in consequence an additional quarter's rent, up to 1st August last, became forthwith due and payable, and defendant likewise applied the proceeds of said distress in payment thereof.

Issue.

The case was tried at the last Assizes at St. Catharines, before Gwynne, J.

The facts were as follow :—

One McColl was tenant to the defendant of certain premises in which he carried on the business of a baker and confectioner, for a term of three years, from the 1st November, 1876, at a yearly rental of \$325, payable quarterly, by equal portions, on the first days of February, May, August, and November, in each year.

On the 4th May, 1877, the defendant issued a distress warrant to a bailiff, directing him to distrain the goods of McColl, on the demised premises, for the sum of \$162.50, being the amount of six months' rent then in arrear, but no distress was made thereunder, as found by the learned Judge, until the 15th of May, 1877.

On the 14th of May, 1877, a writ of attachment, under the Insolvent Act of 1875, was issued against McColl, directed to the official assignee of the county of Lincoln, and delivered to the plaintiff, who was such assignee. Under this writ the plaintiff went, on the 15th of May, 1877, to the demised premises, and found the goods of McColl in the possession of the defendant's bailiff, who

had previously seized them as a distress for the said rent. The plaintiff thereupon demanded the goods from the bailiff, who refused to give them up, and subsequently sold them under the distress for the gross sum of \$353.45.

Subsequently to the said sale the plaintiff demanded, in writing, the goods of McColl from the defendant, and on the same day brought this action.

At the trial it was contended that the plaintiff had no *locus standi*, because he never had actual possession of the goods, and the affidavit upon which the writ of attachment issued was not sufficient in law to warrant its issue; but the learned Judge decided this contention in favour of the plaintiff, because there was no plea under which it could be raised.

He also decided, upon the view he took of the decision by the Court of Appeal in *Mason v. Hamilton*, 22 C. P. 411, that "the effect of the Insolvent Act is, to vest, upon the issuing of the writ of attachment, in the assignee, and, even in the case of a prior distress levied, but not perfected by sale, to convert the landlord's remedy from that by proceeding further with the distress into a mere lien." He found a verdict for the plaintiff for \$367.60.

Davidson, 23rd of May, 1878, obtained a rule *nisi* to set aside the verdict, and for a new trial, or to enter a verdict for the defendant, on the ground that defendant having distrained the goods in question for rent, he was entitled to hold the same against the plaintiff, and that no title to the goods by virtue of the attachment under which he claimed passed, the affidavit upon which it issued being defective, (1) as not shewing that McColl was a trader, or engaged in such occupation as subjected him to insolvency; (2) as not shewing the residence of said McColl; (3) as not shewing that defendant had any debt provable against said McColl; and on the ground that the distress was made prior to the issue of the attachment.

He also moved on the law, evidence, and weight of evidence; or to reduce the verdict to the amount

plaintiff would be entitled to on the common counts, upon the ground that the distress was regular and proper, and the plaintiff was only entitled to the amount realized by the sale in excess of the amount due in respect of rent.

F. Osler, 5th of June, 1878, shewed cause. The distress was after the issue of the writ of attachment, which was issued on the 14th of May, and the Judge so found. As to the right of defendant to attack the plaintiff's position, there was no proper plea pleaded under which the point could be raised.

The property vested in the plaintiff by the issue of the writ of attachment.

There should have been a special plea to put in issue the plaintiff's representative character: Rule 5, p. 712, Har. C. L. P. A. He also cited *Jones v. Brown*, 1 Bing. N. C. 484; *Mason v. Hamilton*, 22 C. P. 190, 411; *Re Hoskins*, 1 App. R. 379; *Griffith v. Brown*, 21 C. P. 12; *Munro v. Commercial Building and Investment Society*, 36 U. C. R. 464; *Re Kennedy*, 36 U. C. R. 471.

Davidson, contra. The distress was for rent which had accrued within six months previous to the insolvency. The statute does not take away the right of distress, but only the right to distrain for more than one year. *Griffith v. Brown* is directly in point, and *Re Hoskins* upholds it. In the former case the distress was *after* the issue of the attachment; in the latter there was no distress. [HARRISON, C. J.—The question is, whether the right of distress is not superseded by the preferential lien.] Then as to the second point. The attachment passed nothing. No plea was necessary: like the sale of property, a third party may impeach the title as proposed here to do: *Grover v. McArdle*, 33 U. C. R. 252. The affidavit does not shew that the plaintiff holds no security: *McDonald v. Cleland*, 6 P. R. 292. Plaintiff's occupation and residence are not mentioned, nor is it shewn that defendant is a trader: *Patterson v. Maughan*, 39 U. C. R. 371; *Revell v. Blake*, L. R. 7 C. P. 314; *Butler v. Hobson*, 4 Bing. N. C. 290.

ARMOUR, J.—The ruling of the learned Judge, on the two points decided by him at the trial, is the matter in controversy before us, and upon the correctness of which we have to decide.

I have come to the conclusion that the learned Judge's ruling on the first point is correct.

Rule 5, of the general rules as to pleading, of Trinity Term, 1856, provides "In all actions by and against the assignee of an insolvent debtor * * * the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not, in any case, be considered as in issue, unless specially denied."

In this case the character in which the plaintiff is stated on the record to sue is, "the official assignee of the estate and effects of W. D. McColl, according to the Statutes in force concerning Insolvents," and although there is a plea on the record denying the goods to be the goods of the plaintiff as such assignee, there is no plea specially denying the plaintiff's character of assignee. I did think that, as the plaintiff's right to maintain this action depended upon his right to the possession of the goods in question (he never having had actual possession of them,) and such right being dependent on his being assignee, the plea denying the goods to be the plaintiff's as assignee would involve the proof, on the plaintiff's part, that he was assignee, and permit the defendant to shew that the plaintiff was not such assignee. The case, however, of *Jones v. Brown*, 1 Bing. N. C. 484, is conclusive in favour of the plaintiff, and of the ruling of the learned Judge.

As to the second point, I cannot adopt the view the learned Judge took of the decision of the Court of Appeal in *Mason v. Hamilton*.

All that Court was called upon to decide, and all that it did decide was, that the landlord's lien was restricted to one year's rent, even when he had distrained before the insolvency, but had not sold.

That decision, although binding on me as to what it was necessary for that Court to decide in that particular case,

does not so much impress me by its reasoning, as to induce me to extend it to what the Court was not called upon to decide, and to what, in my opinion, it did not decide.

There is nothing whatever in the insolvent law taking away from the landlord his right to distrain, and until it is expressly taken away I shall assume it to continue to exist. To take it away by judicial decision without legislative enactment, would be, as was remarked by Cockburn, C. J., in a recent case "an assumption of legislative authority which has at times characterized our judicature:" *Angus v. Dalton*, L. R., 3 Q. B. Div. 85.

In this case the landlord distrained upon the goods in question while they were in the hands, possession and custody of the tenant. After he had so distrained, and while the goods were *in custodia legis*, the assignee came and demanded them. I think that if the assignee had then paid or tendered the six months' rent then due, he would have been entitled to the goods; and that not having done so the landlord was entitled to proceed with the distress, and realize by sale the six months' rent then due to him.

The goods produced, when sold by the landlord, the sums of \$353.45. From this should be deducted \$162.50, the six months' rent due to the landlord and \$36 for the costs and charges of the distress and sale, including auctioneer's charge for selling, leaving \$154.95, on which should be allowed one year's interest, \$9.30, making \$164.25, to which latter sum the verdict should be reduced.

See *Mason v. Hamilton*, 22 C. P. 190, 411; *Griffith v. Brown*, 21 C. P. 12; *Re Hoskins*, 1 App. R. 379; *McLeod v. McGuirk*, 2 Pugsley N. B. R. 248.

HARRISON, C. J., concurred.

Rule accordingly.

THE ONTARIO BANK V. WILCOX.

Chattel mortgage to secure endorser of notes—Assignee in insolvency—Notes improperly stamped—Execution—Attachment.

- Held*, 1. That a chattel mortgage, given to secure the mortgagee against his indorsements for a mortgagor, must shew on its face that the notes endorsed, or any renewals thereof, will fall due within the year, otherwise the mortgage will be void against creditors or purchasers, but not against the assignee in insolvency.
2. That notes not properly stamped, taken by a bank, are invalid if the bank does not attach double stamps and properly cancel the same when it first receives the notes, and will not support a chattel mortgage.
3. That an execution against an insolvent debtor is superseded by an attachment in insolvency, and a chattel mortgage void against an execution creditor, but good against an assignee in insolvency, prevails over an execution so superseded.

INTERPLEADER.

The property in question consisted of certain goods which had been seized by the sheriff of the county of Ontario, under the executions mentioned in the interpleader order, and the question was, whether these, or any part thereof, were, or was, when seized, the property of the Ontario Bank, as against the execution creditors in the said order mentioned.

The trial took place at the last Fall Assizes at Cobourg, before Gwynne, J.

The facts were, according to the finding of the learned Judge, as follow :—

W. S. Sexton, the insolvent, was, on the 30th March, 1876, indebted to the Ontario Bank upon certain promissory notes made by him, and endorsed by one Edward Mayor. These were discounted by the bank, the amount being \$52,400.95, \$22,000 of which had fallen due on the 23rd of March, and the remainder of it was maturing in varying sums between the 1st of April and the 3rd of July. Sexton was also indebted to the bank on other notes. Of some of these he was the maker, on others the indorser, and these also had been discounted by the bank. Mayor was not indorser upon these.

These notes, with a further advance by the bank, then agreed to be made to him, of \$3,000, made Sexton's whole debt to the bank, on the 30th of March, 1876, \$68,228.

Upon that day he gave a mortgage on village lots in the village of Port Perry, by way of collateral security, to the bank, for the purpose of securing the payment of this sum, with interest at seven per cent.

The amount secured by the mortgage was payable on the 30th June next following, or on the mortgagor paying or retiring the notes, or any other notes which might be given in renewal of them.

On the 11th of May, 1876, Mayor was liable on Sexton's paper to the bank to the extent of \$48,900.95, but none of it, by reason of its renewal, was then actually due.

On that day Sexton gave a chattel mortgage to Mayor, which recited that Mayor "has endorsed four promissory notes of the party of the first part, for the whole sum of forty-three thousand dollars." The notes were set out, dated the 11th of May, 1876, and were made by Sexton, payable to Mayor, or order, at the Ontario Bank, Port Perry, at three months, and endorsed by Mayor. The notes were for the respective sums of \$22,000, \$13,000, \$4,000, and \$4000. The mortgage further recited that Sexton had "agreed to execute these presents for the purpose of indemnifying and saving harmless the party of the second part from the payment of the said promissory notes, or any part thereof, or any note or notes hereafter to be endorsed by the party of the second part, for the accommodation of the party of the first part, by way of renewal of the said recited note (*sic*), or any interest to accrue thereunder, or otherwise howsoever."

The proviso and covenant for payment followed the terms of the recital.

The usual affidavit was made by the mortgagee, and the affidavit of execution was made by Allan Nash Sexton, a son of the mortgagor.

On the 29th of June, 1876, Mayor made a deed of assignment to the bank. It recited that he was indebted to the

bank in the sum of \$48,000 for moneys already advanced by the bank on certain promissory notes by W. S. Sexton, and endorsed by Mayor, and that the bank had agreed to extend the time for payment of such of the said notes as were then overdue for a period of three months from the date of the assignment, and for such of the notes as were not then due for a period of three months from the maturity of the same, and also to advance and pay for Mayor, and at his request, to the Sheriff of the county of Ontario, a sum sufficient, namely, \$2,600, to pay off and discharge certain executions (save and except executions in favour of the bank) then in the hands of the said Sheriff, and which were against and formed a lien on the lumber, goods, and chattels mentioned in the chattel mortgage before referred to, on receiving from Mayor as collateral security for the payment of part of said notes, and of the sum so paid as aforesaid, an assignment of the said chattel mortgage.

Allan Nash Sexton, the insolvent's son, witnessed the execution of the assignment, and made an affidavit of its due execution.

The bank claim was made, under the chattel mortgage and assignment, upon the four promissory notes in the mortgage mentioned.

On the 11th of May, 1876, Mayor, by deed, agreed with Sexton to permit him to sell the goods mortgaged, and to apply the proceeds in paying the said four notes, Mayor agreeing to renew the notes for one year from the 11th of May, 1876. Sexton, notwithstanding the mortgage, was to continue his business as usual.

Mayor's evidence was to the effect that he refused to endorse any more notes for Sexton unless he got the chattel mortgage; that he required to be so secured when he found out at the bank that his endorsements amounted to more than \$40,000; that it was upon the faith of his getting the security that he endorsed the four notes which were mentioned in the chattel mortgage; that he gave them for renewals, and that before these notes were used he had the promise of the mortgage. Mr. Moberley, the bank manager

at Port Perry, said the bank wanted security from Mayor: that the bank was pressing for security, and he understood Sexton was to give Mayor a mortgage, and Mayor was to give it to the bank: that the notes were not discounted which were mentioned in the chattel mortgage, being simply held as representing *this debt*. *The debt*, from what he said, consisted of the following four notes, which were then in discount in the bank; one, dated 12th of April, 1876, at forty-five days, for \$13,300; two, dated 27th of April 1876, at three months, for \$1,400; three, dated 12th of April, 1876, at forty-five days, for \$22,000; four, dated 15th of April, 1876, at three months, for \$1,400; all made by Sexton and endorsed by Mayor: that the four notes in the mortgage mentioned were current paper, but not put through the books: that the notes were protested when they fell due: that they were not renewed, nor asked to be renewed, but it was understood between him and Sexton that they might be renewed: that he got the notes from Sexton complete as they were.

He also said: "I cannot tell when I got the four chattel mortgage notes into my possession. They are not entered in any book in the bank, they are simply put away with the other papers. They only passed through the notary's book when protested. The stamps were put on by the bank. They are cancelled in my handwriting, double stamps. The stamps were not put on upon the 11th of May, they were put on later, although they express to have been cancelled on the 11th of May. They were put on before maturing. It was not done for a few days after I first got them, for we had no stamps. I got them, I think, before the 30th of May."

Mr. Loscombe, the solicitor of the bank at Bowmanville, said a chattel mortgage was to be taken by Mayor from Sexton, and it was to be assigned to the bank. The bank suggested that course, and insisted the mortgage should be given.

Allan N. Sexton said he heard the subject of the chattel mortgage spoken of at the bank, Port Perry, by his father

with Mr. Fisher and Mr. Loscombe on the 6th of May, 1876. He also said the mortgage from his father to Mayor was proposed voluntarily by the father to Mr. Loscombe, the solicitor of the bank, and that Mr. Loscombe said the parties might arrange it among themselves: that the four notes were not dated when the mortgage was given. The two notes for \$22,000 and \$13,000, were intended to renew the notes for \$22,000 and \$13,000, then lying in the bank. One of the \$4,000 notes was intended for Post & Co., or Thompson Smith & Son, which was the same business, and the other \$4,000 was intended to pay some executions, and to have some money in hand: that he had those four notes in his possession for four or five weeks after the mortgage was given: that he saw Mr. Fisher of the bank and told him the mortgage had been given to Mayor, and if the bank would assume his father's (Sexton's) outside liabilities, Mayor would assign the mortgage to the bank, and that Mr. Fisher promised to do it, and to share ratably with Post & Co.; and that Mr. Fisher promised to go down to Port Perry and see about it, and he and Mr. Loscombe came there about the middle of June; that Fisher said then he would attend to the Post & Co. matter, and the money required to pay off the executions was made up at \$2,600: that Loscombe then asked where the four notes were, when he, A. N. Sexton, said he had them in his pocket, and Loscombe said to him he should not carry them in his pocket, that he should leave them with the manager, and that he, Sexton, objected until the bank gave an undertaking to carry out the agreement. Loscombe said if the agreement was not carried out, he, A. N. Sexton, could have the notes back at any time, and then he left the notes with Mr. Moberley: that he objected to the condition of paying off only the executions which were prior to the chattel mortgage, and Mr. Moberley then discounted his note for \$2,600 to pay the executions, which was more than enough to pay those which were before the mortgage, he, A. N. Sexton, requiring that the bank should pay off all the executions, so that all his father's indebtedness should centre in the bank.

After detailing some other conversations with Mr. Fisher and others, he said he wrote for his father to Mr. Loscombe on the 27th of March, 1877, making certain propositions :

1. That the bank release Sexton and himself, A. N. Sexton, from all liability, direct and indirect, to the bank, and that they be released from all covenants in any mortgage or deed whatever.

2. That all sales made of any goods in the chattel mortgage be confirmed and settled by the bank, the proceeds of sales made since the 24th to be paid to the bank, who were to pay the writer a commission on such sales.

3. That the bank should give a lease to Mr. M. E. Sexton of that part of lot 123, on the east side of Water street, Port Perry, with water frontage, not occupied by railway, for five years, at a nominal rent of \$1, with power to sublet.

4. That the bank would in one month after his releasing his equity of redemption in lands mortgaged to the bank, and in the chattels in the chattel mortgage, convey to Mrs. Amanda M. Sexton all the household furniture and chattels in his private residence, at Port Perry, at the nominal consideration of \$1.

5. That the bank would pay off all mortgages on real estate that were prior to those mortgages which had been given by him, Sexton, to the bank, and would release and quit claim the following properties to the following persons. (Setting out properties and persons.)

6. That the bank would release from their mortgage the lands actually sold to Wm. McLernon, on receipt of two notes of \$116.82 each, due 5th February, 1879, the notes being made by W. F. Parish.

7. That the notes of Catharine Howe, and of other parties, in his Sexton's favour, which were specially secured by mortgage from him, should be given up.

8. That a note of Jessie Ireland for \$75 should be given up.

9. That himself and his son Allan N. Sexton should be allowed to retain possession of the respective residences occupied by each of them for one year without rent.

On the 27th of April Mr. Fisher answered the above letter, by his letter as follows :

1. "In consideration of Sexton's releasing his equity of redemption in the lands in the mortgages to the bank, the bank will in the release discharge him from personal liability in respect of his indebtedness to the bank.

2. The bank will deem all sales of chattels mentioned in the chattel mortgage made [*i. e.*, such sales made] by A. N. Sexton valid, excluding the racing mare, and all moneys unpaid for chattels so sold are to be paid to the bank.

3. The bank will rent to Sexton's wife the house he now lives in, and to Mrs. A. N. Sexton the house she occupies, and the part of lot 123 on the east side of Water street, except that part occupied by the railway, the two former for one year, and the lot for five years, each at a nominal rent of one dollar a year, lease to contain all proper and reasonable covenants," &c., &c.

The letter concluded as follows:

"In consideration of your wife releasing her dower in the lands embraced in the releases, and executing the release, the bank will give to her all the household furniture in the house, if E. Mayor consent.

The bank will pay off mortgages, and release the lots mentioned in 5th paragraph of your letter of 27th of March, 1877. The bank will also release from any claim had by them, the lands recently sold to McLernon, on the conditions set out in paragraph 6 of your letter

Mr. Shaw and Mr. Hurd's notes will be given up on the payment by each of their respective mortgages given to secure payment of the notes, and held by the bank; and the bank will allow A. N. Sexton to sell lots, but subject to the bank's approval, for a period of three months, at a reasonable price, he to be allowed a commission of 5 per cent. on all sales which don't realize \$500, and 2½ per cent. on all sales that realize over \$500."

The bank sold property not in the chattel mortgage, 15,000 feet long stuff made from boom timber, and about as much short stuff made from boom timber; also 250,000 to 300,000

feet of lumber on lot D, not in the chattel mortgage; also 127 churns, 75 cords of slabs, 90,000 feet of lumber made from logs bought by W. S. Sexton after the mortgage (that the bank had allowed for); and there was also machinery in the mill not in the chattel mortgage. The bank sold on 5th May, 1877. The attachment in insolvency issued 16th May, 1877. After the chattel mortgage, A. N. Sexton's father had no property left to pay the creditors, but a few village lots.

The same witness, *A. N. Sexton*, in his cross-examination, said the bank was never entitled to the notes in the chattel mortgage, because they were only to get them upon carrying out their agreement, which was that they were to assume all Sexton's outside liabilities: that his father asked Loscombe if he had not better give Mayor a chattel mortgage, who told him to arrange it among themselves: that he, A. N. Sexton, was angry with his father for speaking of it, and he suggested to Mayor, that he, Mayor, should take the mortgage and so keep the control of affairs in their own hands. "The long and short is, the idea was to use the chattel mortgage as the means of pressure upon the bank to pay outside liabilities, and to centre our liabilities in the Ontario Bank."

At the time the chattel mortgage was assigned to the bank, they paid \$2,600, and were to settle with Post & Co., but that was not all they were to do.

In his letter, in the father's name, of the 18th of *April*, (should be *May*) 1876, he said to Smith & Son: "I have executed a mortgage to Mr. Mayor on all my chattels, which was necessary through pressure of Mr. Mayor, and his refusal to endorse until this was done."

In his cross-examination he said that statement was not true, but it was necessary to say so to his correspondents. He denied that Wharton was for the bank and by the bank put in possession of the chattel mortgage property, or that he, witness, ever pointed out to Wharton what property the mortgage covered. He understood the bank wanted Wharton merely to take an account of what went out of the yard without interfering with Sexton.

He said he had made a statement of sales to the bank from the time of the chattel mortgage, or from the time of the assignment of it to the bank.

Alonzo Sexton said he was in the employ of W. S. Sexton. There was, by his estimation, from 250,000 to 300,000 feet of lumber on lot D. Part was sold by the bank, and part remained there yet. * * * That stuff was there in May, 1876, or the bulk of it. Lot D was in the village of Port Perry, (not perhaps within the limits). It adjoined the lumber yard, and was made from Lake Scugog by saw-dust, slabs and rubbish from the yard. The lot, though made as above, was patented as lot D. The logs, got since the chattel mortgage was executed, came on the premises in July, 1876. He measured them. They made about 150,000 feet of lumber.

Wm. Kennedy said he was foreman in the lumber yard: that he never estimated the lumber on lot D: that there was some there in May, 1876, and the greater part of it, probably 200,000 feet, continued there until the sale in May, 1877.

John A. Hoyt, was in Sexton's employment, sometimes in the office, and sometimes in the yard. He did not know where lot D came, but in May last he estimated about 250,000 feet of lumber lying on saw-dust, on what was called water lots. The biggest part was there in May, 1876.

Allan Sexton said, when he was recalled, that lot D was in the township of Reach, outside of the village of Port Perry: that it was not assessed in Port Perry: that whether it was assessed in Reach or not, he did not know: that the patent called it in the township of Reach: that it was not in the village of Port Perry: that he did not know the limits of the village further than he always understood that lot 19 was the boundary of the village.

Mr. Fisher, for the plaintiffs, said that the allowance to Post & Co., on the cargo of lumber sent to them on account of the bank as a *pro ratâ* allowance with the bank, was a special arrangement as to that one cargo, and was made by the bank to prevent any ill feeling: that A. N. Sexton

after the assignment to the bank was employed by the bank to sell any lumber he could, and to deposit the proceeds in the bank: that he was to make a return every week: that he did not do so, and Mr. Wharton was employed to look after the stuff: in September, 1877, A. N. Sexton made a return of what he had sold from the 29th June, 1876: that when the releases of the equity of redemption were executed, it was understood the bank was to retain the goods in the chattel mortgage: that A. N. Sexton's letter of the 23rd of March, 1877, spoke of that being so, and the bank had kept the stuff insured: that the checks of the 31st March, 1877, 7th and 14th of April, for \$94 in all, were Sexton's checks for his commission on sales: that if, in executing the release, the chattel property had been released, it was contrary to the intention: that he learned Mayor required a chattel mortgage to be given to him, and when he, Mr. Fisher, heard of it, he insisted Mayor should assign it to the bank.

Mr. *Wharton* said, in September, 1876, Mr. Loscombe, for the bank, put him in possession at the lumber yard. He was to keep an account of sales made, but not to interfere with the sales. Mr. A. N. Sexton pointed out the lumber to him, and A. N. Sexton told his clerk to give Wharton a daily account of sales, and said he was to return the proceeds of sales to the bank. The bank gave him, Wharton, a book in which to make the entries, and A. N. Sexton headed it as follows: "Memorandum of sales of certain goods and chattels mentioned in a certain chattel mortgage from W. S. Sexton to E. Mayor, and assigned to the Ontario Bank."

Wharton got a power of attorney afterwards from the bank, dated the 18th of November, 1876, which authorized him to enter on the land where the chattel mortgage property was placed, and to seize and take possession of the goods and chattels there placed, and to sell, or retain and keep possession of the same in pursuance of the covenants contained in the said mortgage, in case the said notes were not paid.

Mr. Fisher, and the other persons acting for the bank, were not aware that contemporaneously with the chattel mortgage Mayor had given to Sexton the right, notwithstanding the mortgage, to carry on his business as usual for a year without interruption, and to renew the notes in the chattel mortgage mentioned for that time; and the bank acted throughout merely under the chattel mortgage and assignment, being in ignorance of the contemporaneous assignment; and Sexton appeared to have concurred in that course of proceeding, for he never set up the contemporaneous assignment.

The following were the mortgages which the bank had from W. S. Sexton.

1. A mortgage on real estate, dated 28th January, 1874, to secure \$38,330.

2. A mortgage on other real estate to secure \$68,228, dated 30th March, 1876.

3. A mortgage on chattel property, dated 11th of May, 1876, given to Edward Mayor, and by him, on the 29th of June, 1876, assigned to the bank to secure the four promissory notes before mentioned, amounting to \$43,000.

4. A mortgage from Edward Mayor, dated 1st February, 1877, on real estate, to secure \$55,600 which Mayor owed the bank, as endorser of promissory notes for Sexton, by which mortgage the bank agreed to give Mayor until the 1st of February, 1879, to pay the said sum, Mayor not being personally liable.

1. On the 27th of April, 1877, Sexton released to the bank his equity of redemption in the lands in the mortgage first above mentioned, and the bank released Sexton "of and from all manner of action, cause or causes of action, claims and demands, both at law and in equity, which they now have had or ever had under and by virtue and on account of the covenant for payment of the said sum of \$38,330."

2. On the same day the like document was executed between Sexton and the bank, as to the mortgage secondly above mentioned, for \$68,228.

3. There was no release of the equity of redemption of the chattels in the mortgage thirdly above mentioned, but Sexton, in his letter of the 27th of March, 1877, before mentioned, agreed, by the 4th clause of the letter, to release his equity of redemption, as well as to the chattels in the chattel mortgage as to the lands in the other mortgages mentioned, (and see also his letter of the 23rd of March).

The acceptance of the terms of that letter by the one of the bank of the 27th of April, 1877, did not, in express words, require a release of the equity of redemption in the chattels mortgaged, but the general tenor of the letter shewed that the bank was to remain the owners of the chattels, because it provided for the bank confirming the sales made by Sexton of portions of the chattels, and that the moneys due for the chattels so sold should belong to the bank.

Mr. Fisher also said it was understood the chattels contained in that mortgage were, notwithstanding the release by the bank in the real estate instruments contained; but A. N. Sexton believing that in law the chattels had been released by the bank, by reason of the releases they had executed and before mentioned, forbid the sale of the chattels which the bank made on the 5th of May, 1877.

4. On the 1st of February, 1877, the bank released Mayor, personally, from all, and all manner of actions, causes of action, &c., &c.

The attachment in insolvency against W. S. Sexton was issued on the 16th of May, 1877.

“Mayor’s practice in his dealings with Sexton,” as the learned Judge found, “was to leave with Sexton to use, as he might require, printed promissory notes in blank, endorsed by him (Mayor). In May, 1876, Sexton had in his possession several of such blank notes endorsed by Mayor. Mayor becoming uneasy at the state of his liability to the bank, as endorser for Sexton, and partly at the suggestion of the bank, refused to endorse any more for Sexton unless the latter would give him (Mayor) a chattel mortgage by way of security. Accordingly, on the 11th of May, 1876, Sexton gave the chattel

mortgage before mentioned. Four of the blank endorsements of Mayor which Sexton held, were then filled up with the sums before stated and dates, completing the notes, save only that they were not stamped. This I find to be the fact, notwithstanding the evidence of Allan N. Sexton to the contrary. It was not the intention of Mayor, in thus taking security for these four notes, to increase his liability as endorser for Sexton, but, on the contrary, the understanding was, that these notes, when used, should be applied by way of renewal of or to retire notes of a like amount then held by the bank, and not yet arrived at maturity."

The learned Judge found that the chattel mortgage was executed with the intent, both of Sexton and Mayor, that it should be assigned by Mayor to the bank to procure an extension of time for payment of the current notes, and for a further advance to be made by the bank, and that the bank should, by paying off the executions prior to the 29th of June, 1876, excepting their own execution, get the lumber in the chattel mortgage contained free from all encumbrances, and that arrangement was carried out: that the prior executions were paid off, and the bank was to have the full benefit of the chattel mortgage, to the extent of the amount represented by the four notes, for \$43,000, and Sexton got the immediate benefit of the payment of these executions and of the extension of time then given: that A. N. Sexton should thereafter sell the lumber on behalf of the bank, and deposit weekly the proceeds of such sale in the bank: that A. N. Sexton did not make such deposits or account to the bank for such sales, and in consequence thereof the bank, on the 14th September, 1876, with the knowledge and concurrence of W. S. Sexton, placed Wharton, as their tenant, in possession of the chattels mentioned in the mortgage which were then unsold, and that such chattels were pointed out by Sexton and his son to Wharton for that purpose, who from thenceforward continued in charge of the chattels for the bank in accordance with the instructions which, with the knowledge and concurrence of

W. S. Sexton, Wharton received from the bank; and that these instructions were, that Wharton should not permit A. N. Sexton to make sales without making a due return thereof to the bank : that Wharton, from the 14th September, 1876, continued in constant charge for the bank, exercising control over the chattels in the mortgage contained, and which had been delivered by Sexton and his son into Wharton's possession for the bank, for the express purpose of giving a more perfect title to the bank and the control over the chattels, and to secure the bank in the proceeds of the sales according to the agreement of the parties : that the mortgages given by the Sextons to the bank, being deemed quite an insufficient security for the debt which the bank had against W. S. Sexton, Mayor, on the 1st of February, 1877, gave a mortgage to the bank upon certain lands of his as further security to the bank for his endorsements for W. S. Sexton, to the amount of \$55,600; and it was provided by the mortgage that it should not be construed or taken to be any merger of the simple contract liability of any person whomsoever, other than the said mortgagor, upon any promissory notes already given and held, or thereafter to be given and held, in respect of said indebtedness, or by way of renewal thereof, or additional security therefor; and that the mortgage should not operate as a discharge or release of any security held by the bank in respect of the said indebtedness; and their rights in respect of such securities were thereby expressly reserved, and at the same time the bank executed a release of all personal liability by reason of the indebtedness or liability of Mayor mentioned in the mortgage only as provided by the mortgage: that in March, 1877, the Sextons agreed with the bank to release their equity of redemption in real estate held by the bank by mortgage, and it was part of the arrangement, involved in it, that the bank should retain, to their absolute use, the chattels in the chattel mortgage contained, which were treated as the absolute property of the bank, and of which Wharton was in possession as aforesaid; and that the bank should release the Sextons from

all cause of action under the covenants in the said mortgage for payment of the said mortgage debt: that the bank, in April thereafter, executed such release, and Sexton released his equity of redemption in the lands he had mortgaged to the bank; and that throughout the whole negotiation the right of the bank to the said chattels, and of which Wharton was so in possession, was recognised as good and valid; and that by the letter of March, 1877, W. S. Sexton had agreed that the equity of redemption of the chattels, in the chattel mortgage mentioned, should also be released: that 15,000 feet of long stuff seized by the Sheriff was not part of the property comprised in the chattel mortgage: that the churns then also seized were not comprised in the said mortgage: that 75 cords of slabs, or thereabouts, were not comprised in the said mortgage; and also that a quantity of short stuff bought in by the bank, made out of boom timber, but the precise quantity of which was not proved, was not comprised in the said mortgage; and that the above articles were not intended to be passed to the bank.

"But I find," the learned Judge proceeded, "that all the residue of the goods and chattels seized on by the sheriff, and which are the subject of this suit, (the bank having abandoned all claim to 90,000 feet of the lumber,) were comprised in the said mortgage, and were intended to be transferred by W. S. Sexton to the bank, and were by Sexton and the bank placed under the charge and control of Wharton for the bank; and as to these chattels, it was the intention of Sexton to vest them in the bank as before stated, freed and discharged from all claims thereto by him, so far as he could do so; firstly, as a collateral security with other securities held by the bank; and, secondly, by the arrangement negotiated in March, as the absolute property of the bank as against Sexton."

The learned Judge concluded as follows: "But I rule and decide, as a matter of law, that by reason of the manner in which the said mortgage to Mayor was drawn, and by reason of the fact that the particular notes therein referred to were never discounted by the bank, and by reason of

the manner in which, under the circumstances, the security which it was intended the bank should have in the goods and chattels mentioned in the chattel mortgage was purported to be transferred to the bank, the actual intention of all the parties to that transaction—W. S. Sexton, Mayor and the bank—has been frustrated, so as to permit, contrary to such intention, by force of the terms of the Chattel Mortgage Act, the creditors whose executions were in the hands of the sheriff, whose claims in the whole amount to \$1,460.16, to intervene to the prejudice of and in preference to the bank.

And I find that, subject to such claims of such execution creditors, the whole estate and title of W. S. Sexton, in the said goods and chattels so seized by the sheriff, except those as herein found not to have been comprised in the said mortgage, have passed from Sexton to, and are vested in, the bank.

I find that no claim was set up to the goods and chattels, or to any part thereof, before me in right of the assignee in insolvency of W. S. Sexton, independently of such title as the assignee would acquire in the event of such interpleader issue being found in favour of such execution creditors as against the bank.

In the above, I have found that the lumber upon lot D was comprised in the chattel mortgage, and was among the lumber intended to be passed by W. S. Sexton to the bank.

What I mean by holding the executions to have a preference over the bank, notwithstanding I find that Wharton was placed in actual charge for the bank, is that, although I consider both Wharton and A. N. Sexton had control, the latter as well Wharton under and for the bank, yet A. N. Sexton having been originally in charge for W. S. Sexton and Wharton's possession not being exclusive, I do not consider the *change of possession*, although sufficient as against W. S. Sexton, to have been such as, in view of the provisions of the Chattel Mortgage Act, would exclude the claims of the execution creditors. It would,

as it seems to me, be a fraud upon the bank for W. S. Sexton to claim or to be allowed any interest as against the bank; and it is only because of what appears to me the bungling and defective way in which a very clear intention to give the bank security by way of mortgage was attempted to be carried out, that the bank cannot, in my opinion, hold to the exclusion of those execution creditors."

The verdict was therefore rendered as follows: "I find a verdict for the defendant for 15,000 feet of long stuff made out of boom timber, and a quantity of short stuff made out of same timber, which was bought by the bank at the sale, but the quantity of which was not proven before me; also for all the churns seized by the sheriff, and also for seventy-five cords of slabs; and as to the residue, subject to the amount of the executions in the sheriff's hands, amounting to \$1,460.16, I find a verdict for the claimants, the Ontario Bank."

In Michaelmas Term last *Hector Cameron*, Q.C., obtained a rule calling on the plaintiff to shew cause why the verdict, so far as it was for the plaintiffs, should not be set aside, and a general verdict be entered for the defendant, on the ground that the issue being whether the goods in question were the property of the plaintiffs as against the execution creditors, and the learned Judge having found that the title of the plaintiffs, was not good as against the executions, a general verdict for the defendant should have been entered; and also on the ground that on the law and evidence the defendant was entitled to such verdict, and that the plaintiffs' title being bad as against execution creditors, was also bad as against the defendant, the assignee in insolvency; or why a verdict should not be entered for the defendant as to the lumber on lot D, and as to all the machinery not described in the chattel mortgage, on the ground that the plaintiffs proved no title thereto, and that a more specific description thereof by evidence could not be given, owing to the refusal of the plaintiffs to allow an examination of the property in their possession, as disclosed in the affidavits and papers filed.

In Hilary Term last *M. C. Cameron*, Q. C., shewed cause.

The four promissory notes mentioned in the chattel mortgage in question, it is said, are not available to the bank because the bank never discounted them, and as the mortgage was given only to secure the payment of these notes and any renewals of them, that the mortgage was of no value to the bank, and therefore never passed any title in the chattels mentioned in it to the bank. But the bank, although it did not discount these notes, took them and held them in security for notes of the parties which had been discounted, and were held by the bank, and which were maturing or had matured.

When Mayor, to whom W. S. Sexton gave the chattel mortgage, endorsed these four notes, or when Mayor's blank endorsements were filled up by Sexton, so as to be binding upon Mayor, then it was Sexton gave the mortgage; and these notes after a time, and long before maturity, were delivered by Sexton to the bank, and then the bank required Mayor to assign the chattel mortgage over to them. These notes were made by Sexton, and endorsed by Mayor, to be used in renewing notes of theirs which were then in the bank, and they were delivered to the bank for that purpose, and continued to be held by the bank as valid securities, although they were never actually treated as renewals. The mortgage was therefore as good in law to protect the holders of these notes as if they had been actually discounted. The bank debt at that time against these parties far exceeded the amount of these four notes. Besides these notes which were given to the bank, an advance of \$2,600 was made by the bank to W. S. Sexton at the time Mayor assigned the mortgage to the bank. That money was given on a note on the day of the assignment of the mortgage to the bank, made by Sexton and endorsed by Mayor, and that fact is specially set forth in the assignment as part of the consideration for making the assignment.

Hector Cameron, Q. C., contra. The finding of the learned Judge is really, on the issue on the record to be tried, a general verdict for the defendant.

The defendant is the assignee in insolvency of W. S. Sexton, and he stands in the position of a creditor. He has, as against the chattel mortgage, all the rights of a creditor : *In re Andrews*, 2 App. Rs. 24. The question on the record is whether the plaintiffs have a right to the goods in question as against the execution creditors of W. S. Sexton, and whether defendant was or is to be treated as in the place of an execution creditor. The question is, nevertheless, whether the plaintiffs have a right to the goods as against the execution creditors of the insolvent. The learned Judge has found that the plaintiffs are not entitled to the goods as against the execution creditors, and therefore the verdict should be against the plaintiffs. In place of that the verdict has been entered for the plaintiffs for a large portion of the chattel property in question, subject to the claims of the execution creditors. The entry of the verdict should therefore be amended by making it correspond with the issue.

The defendant, at any rate, upon the law and evidence, is entitled to succeed upon the following grounds :

The lumber on lot D was not within the terms of the mortgage. The words are, "About 400,000 feet of sawed pine, hemlock, tamarac, basswood and hardwood lumber and timber now piled on lots 122, 123, 38, 39, 40, 41, 42, and 43, in the village of Port Perry, including all the lumber owned by Mr. Sexton," and therefore the plaintiffs should not have recovered for such lumber. The quantity is from 250,000 to 300,000 feet. There was also a quantity of machinery in the mill sold by the plaintiffs, which was not in the mortgage. A list of the articles is attached to A. N. Sexton's affidavit filed on moving the rule ; and there may be more, but they could not be stated, as the bank refused to allow him, according to his affidavit, to have access to the goods and chattels in the possession of the bank, which formerly belonged to his father.

There was here no change of possession of the mortgaged chattel property. The bank put Wharton in the place where the lumber was piled, to keep an account of the sales which were made by Sexton and his son. Sexton and his son were, after that, as much in possession of the property as they ever were. A. N. Sexton, the son, managed everything for his father before the mortgage, and he continued to do so, and with the approval of the bank, after the mortgage, but he was never put in possession by or for the bank.

If a mortgagor be in possession, although the mortgagee or some one for him be also in possession, that is not such a change of possession which the statute requires. See *Ex parte Hooman, In re Vining*, L. R. 10 Eq. 63; *Ex parte Lewis, In re Henderson*, L. R. 6 Ch. App. 626; *Ex parte Jay, In re Blenkhorn*, L. R. 9 Ch. App. 697; *Kough v. Price*, 27 C. P. 309.

If there was no change of possession, the mortgage must fail, unless it can be sustained on other grounds. But the mortgage cannot be supported. It was given for and as security only, and not for any debt: *Robinson v. Paterson*, 18 U. C. R. 55. [HARRISON, C. J.—The case of *O'Donohoe v. Wilson*, lately decided here, is against that.] The notes for which the mortgage was taken, were never discounted or used. They were given to the bank, and were not passed through their books or entered any where, but simply put away with the other papers of Sexton.

Sexton kept the notes for weeks after Mayor endorsed them before he gave them to the bank, and when he gave them over it was upon the faith of the bank carrying out their agreement to assume Post & Co.'s claim for \$4,000 and, in fact, the whole of the other claims against Sexton, and as that was never done the notes never became the property of the bank.

The notes, too, were not stamped when given to the bank, and the bank did not stamp them for two weeks after they did get them; and although the stamps are initialled and dated as cancelled on the 11th of May,

1876, the date of the chattel mortgage, they were not cancelled in fact until long after that day.

The bank, when they took the mortgage from Mayor on his real estate, in February, 1877, took no covenant from him to pay the amount of the debt then secured, and they expressly released Mayor from all personal liability in respect of such claims; and when the bank took from Sexton the release of his equity of redemption in the two mortgages on his real estate, which he had given, and released him personally from payment of the whole of his debt to them, they did not take a release of the equity of redemption of the chattels in the chattel mortgage contained, and the effect of these transactions was to discharge the chattel mortgage, because the personal liability of Sexton the mortgagor was extinguished.

Besides, the release of the equity of redemption of the real estate mortgages was to be in full discharge of the chattel mortgage.

The bank, when they sold the chattels on the 5th of May, 1877, had no right to do so, because, when the mortgage of the 11th of May, 1876, was given by Sexton to Mayor, Mayor executed an assignment of the same date to Sexton, by which Sexton was to be allowed to carry on his business without interruption for a year, by the notes being renewed from time to time, and the bank, though they had knowledge of that instrument and agreement, yet sold the goods before the expiry of the year.

29th June, 1878. WILSON, J.—(After setting out the facts). The chattel mortgage which was taken by Mayor to secure him against the endorsation of the four promissory notes which are mentioned in it, by and at the instance and for the benefit of W. S. Sexton, the mortgagor and the maker of the notes, was, at the time it was made, a valid security between the parties to it, although not valid against creditors and purchasers according to the provisions of the Chattel Mortgage Act. The formalities of the statute were duly complied with by the parties.

The notes were completed in form at the date of the mortgage, and were in the possession of Sexton, the maker, to be used when and where he saw fit in the renewal of notes of his which Mayor had endorsed, and which had been discounted by the Ontario Bank, and were then in that bank still current.

The four notes which were to be retired, were the following:

Note, 12th April, 1876, at 45 days.....	\$13,300
“ 27th “ “ at 3 months....	1,400
“ 12th “ “ at 45 days.....	22,000
“ 15th “ “ at 3 months.....	1,400

Amounting together to.\$38,100

That sum did not amount to so much as the face of the four promissory notes mentioned in the mortgage, which were respectively \$22,000, \$13,000, \$4,000, and \$4,000, in all \$43,000.

There was a difference in the evidence at the trial in consequence of that non-agreement of the notes to be renewed with those which were given, as it was said, for renewals.

The two notes then in the bank of \$22,000 and \$13,300, it was agreed, were to be renewed by the two notes of \$22,000 and \$13,000, which are mentioned in the mortgage; but A. N. Sexton said that one of the notes for \$4,000, secured by the mortgage, was to be given by his father to Post & Co. for a debt of that amount, which his father owed to them; and the other \$4,000 note was to pay off executions, and to give to W. S. Sexton some money in hand for his business. It is certain that Mayor did not endorse the four notes secured by the mortgage for the purpose of increasing his liability for Sexton, but as renewals for the notes on which he was endorser which were then in the bank; but whether the Ontario Bank got the notes, or they were used at another bank and the proceeds paid to the Ontario Bank in reduction of his liability, he did not care.

So far that statement is inconsistent with the purpose of A. N. Sexton, in his contemplated appropriation of the two notes for each \$4,000, as that would have directly increased the liability of Mayor, the endorser.

I am therefore of opinion with the learned Judge at the trial, that the four notes so secured by the mortgage were given by Sexton to the bank in renewal of other notes then at the date of the mortgage about to fall due, and two of which were past due on the 29th of June, 1876, when the mortgage was assigned to the bank.

The bank therefore rightly received these notes for their own use.

But it is said the notes were not renewed by the bank, and in that case these notes never became a charge or liability upon or against Mayor the mortgagee, and so the mortgage expired or became of no avail.

The evidence on that point is as follows : Mr. Moberley, the bank Manager at Port Perry, said :

"The notes named in the chattel mortgage were not discounted. The old notes, which the notes mentioned in the chattel mortgage were to be renewals of, were in the bank past due or current. I got the notes mentioned in the chattel mortgage from Mr. Sexton complete as they are now, we simply held them as representing this debt. They were current paper, but not put through the books. It was no advantage to put them through ; we wanted money to pay the discount. If discounted they would not have been sufficient to take up the old ones. It was understood between the bank and Sexton that the notes mentioned in the chattel mortgage might be renewed. They were never put through the books at all. They were simply protested when they fell due ; were never renewed nor asked to be renewed.

I could not tell when I got the four chattel mortgage notes into my possession. They are not entered in any book in the bank. They are simply put away with other papers. They only passed through the notary's book when protested. The stamps were put on by the bank. They

are cancelled in my hand-writing—double stamps. We did that because they were not stamped when they came into our hands. I don't think the stamps were put on upon the 11th of May. I am sure they were not. They were put on later, although expressed to be cancelled on the 11th of May. They were put on before maturity. It was not done for a few days after we got them, for we had not stamps. I don't recollect when we got them. Exhibits 7, 8, 9, 10, were notes discounted in the usual way. [These are the notes the manager said the mortgage notes were given in renewal of.] I must have got the chattel mortgage notes after the maturity of some of the earlier ones. I think I must have got them before the 30th of May. I got the chattel mortgage notes I think before the maturity of these earlier ones. It was all arranged for at all events."

As regards Mayor, the mortgagee, these four notes mentioned in the chattel mortgage were outstanding in the hands of the bank, and he was liable upon them.

If he or Sexton had, after the delivery of these notes, been sued upon any of the notes for which Sexton and Mayor had given them in renewal, before the renewal notes fell due, they could have pleaded such delivery in renewal as an extension of time for payment of the earlier notes, although not an accord and satisfaction of them, as there is nothing to shew the bank was bound to cancel or to deliver up the earlier notes: *Goldshed v. Cottrell*, 2 M. & W. 20; *Baker v. Walker*, 14 M. & W. 465; *Price v. Price*, 16 M. & W. 232.

If the chattel mortgage notes had been sued upon, neither Sexton nor Mayor could have pleaded a want of value or consideration as a defence, so long as the bank had accepted them and the mortgage which secured them, because the bank would have been bound, by the acceptance of the notes, to give the parties the benefit they became entitled to, that is, an extension of time upon the earlier notes, by the delivery over of the chattel mortgage notes.

It appears to me the bank, by the acceptance of the chattel mortgage notes, and of the transfer of the mortgage

securing the same, and by the express terms of that assignment, by which they "agreed to extend the time for the payment," according to the words of the assignment, of the promissory notes of Sexton, on which Mayor was endorser, amounting at that time to \$48,600, which included the promissory notes for which the four chattel mortgage notes were delivered as renewals, did not only receive the four chattel mortgage notes, but acted upon, and were bound in law to give to Sexton and Mayor the time for payment of them according to their effect and tenor; and that the bank had, upon the receipt of them, upon the terms stated as good and valid a right to retain them and to the chattel mortgage as a security for them, and to claim upon them, and in respect of them, although they did not pass the notes through their books, and although they put them away merely with the other papers relating to Sexton's transactions.

The mortgage, however, is said to be invalid on its face, because it does not appear the debt which the four notes represent is to be paid in a time "not extending for a longer period than one year from the date of such mortgage." The four notes are set out in full in the mortgage, and they are each payable at three months from their respective dates, which are the same as the date of the mortgage.

But the mortgage recites that the mortgage was given to secure the mortgagee from the payment of the said promissory notes, or any part thereof, "or any note or notes hereafter to be endorsed by the said party of the second part for the accommodation of the said party of the first part, by way of renewal of the said recited note, or any interest to accrue thereunder or otherwise howsoever."

The proviso is to the like effect, and is plainly confined to the original notes and to the renewals of them. The covenant is to pay the said notes "and all future and other promissory notes which the party of the second part shall hereafter endorse for the accommodation of the party of the first part, and all interest, &c."

Then it is agreed that in case default shall be made in the payment of the said promissory notes, "or any future note or notes as aforesaid, * * * then it shall be lawful for the party of the second part to enter and take possession," &c.

The *covenant* does not restrict the "future and other promissory notes" to those which may be given in renewal of the original notes expressly secured by the mortgage. Is it so, also, as to the recital, by the words, "or otherwise howsoever"? The affidavit of *bona fides* made by the mortgagee applies the mortgage not only to the four notes and to the renewals of them, but to others, "whether as renewals of the said recited promissory notes or otherwise."

The special objection to the mortgage is, that the provision for the renewal of the original notes is not limited to a period "not longer than one year from the date of such mortgage," and *Kough v. Price*, 27 C. P. 309, is relied on in support of the objection.

The case of *Turner v. Mills*, 11 C. P. 366, cited in that case, may also be referred to.

In the case last mentioned the language was similar in the respect stated to the mortgage in this case, namely, that the mortgage was given to indemnify the plaintiffs from the payment of certain notes, payable at periods long within a year from the date of the mortgage "or any note or notes thereafter to be endorsed by the plaintiffs for Wyatt's accommodation, by way of renewal for the said notes or otherwise howsoever."

It was argued that, as the original notes had been renewed for periods beyond the year, the security was not available to the plaintiff.

Draper, C. J., said, "This instrument was a valid security against the two promissory notes set out in it, and also against any renewal or other notes substituted for those two which would fall due within a year from its date," and there are other expressions to the like effect.

In *Kough v. Price*, 27 C. P. 309, the recital, proviso, and covenant were similar to those in this case, and also the affidavit of the mortgagee.

Galt, J., said, "It appears to me the statute imperatively requires, at the time when the mortgage is given, it should be limited, as respects the liability, in duration to one year. This has not been attended to in the recital in the mortgage in this case."

There the renewal was afterwards given, and extended the time of payment to a period after the expiry of the year from the date of the mortgage.

He also said, "In the case now before us the notes are set out, and all of them would fall due within a period of less than three months, and so far no objection could be taken; but in the recital the agreement is stated to be that the mortgage was executed not only to secure the mortgagee from harm as respects those notes, but also as regarded any other note or notes which might thereafter be endorsed by him as renewals; and there is nothing in any part of the instrument to shew that the intention of the parties was to restrict its operation and the liability of the mortgagee to one year. I think, therefore, that on the face of the instrument it is defective."

It is clear the mortgage distinctly specifies a sum of \$43,000, which will fall due within three months after the date of the mortgage.

It provides for the security extending to any other note or notes which may thereafter be given in renewal of the original notes.

No time is stated within which these renewals, if given, are to be made payable.

There is no obligation upon the mortgagee to renew at all on the face of the mortgage.

By the agreement under seal of the same date as the chattel mortgage, Mayor, the mortgagee, bound himself to allow the mortgagor to continue his business as usual for a year, and to renew the original notes, but then he limited the period of renewal "for the period of one year from the date hereof."

That document was not filed. If it had been, it would have been a part of the mortgage transaction for all pur-

poses. Although not filed, it is binding between the parties to it.

In any case, if it is to be considered in this cause, it shews plainly the limitation of the renewals was to be for one year only from the date of the mortgage, which would certainly have been sufficient if it had been contained in the mortgage.

Is the mortgage void as against creditors, because the time for renewals is not limited in the mortgage to expire at a period not longer than a year from the date of the mortgage?

The statute does not expressly say the time for the repayment of the debt shall be shewn on the face of the mortgage to be payable at a time not longer than one year from its date; but it may be inferred that fact should appear, because the mortgage is to set "forth fully, by recital or otherwise, the terms, nature, and effect of the agreement, and the amount of liability intended to be created;" and "the terms, nature and effect of the agreement" must include the day for repayment.

That, however, does not cover this case, because a day of payment of the original note is shewn here to be within the year; but it is not provided that the renewals, if any were made, shall be made payable also within the year.

These renewals were, in this case, to be the subject of a future arrangement, because the mortgagee was not bound to renew. He might, or he might not, as he pleased. As he might renew, it is true he might give a day for payment beyond the year; and as he had such a power, the other creditors might not know whether he had exercised it or not, and if he had, in what manner and to what extent he had exercised it, or might or would exercise it.

The provision is perfectly good between the parties to the mortgage, although the renewals should be extended beyond the year; but under the statute the provision must be inoperative, unless it appear that the extended time was to expire at a time not longer than a year from the date of the mortgage, for in the case of a renewal, "the

terms, nature and effect of the agreement"—that is, among other things, the day of payment given by the extended time—would not appear in the mortgage, or, as the statute says, be "set forth fully" in it.

I am disposed to think that in every case in which a renewal is to be given, it must be provided in the mortgage for what time or times and for what sum or sums the renewals may be given, so that it may appear the renewals shall not extend the time or payment to a day longer than one year from the date of the mortgage.

Unless such a provision is contained in the mortgage, and if a renewal is made, the mortgage as to such renewal at any rate must be void.

It is contended by the bank that if their title cannot be supported under the Chattel Mortgage Act, that it is valid independently of it by reason of the change of possession of the mortgaged property from the mortgagors to the bank.

From the 29th of June, 1876, when the assignment was made to the bank, till some time in September following, when the bank appointed Wharton to look after the sales made of the lumber, there was no other change made as to the possession and management of the lumber, than by directing and employing A. N. Sexton to pay the proceeds of all sales he made to the bank, and to render from time to time an account of such sales, for which he was to be paid by the bank a commission for that purpose, and to pay all other expenses.

There was no change which was known to or apparent to others than to the immediate parties.

A. N. Sexton did not account to the bank for his sales, and in September, 1876, the bank appointed Wharton their agent, to keep an account of the sales of lumber which Sexton made, and Sexton shewed him the property he was to sell, and was to account to him daily for the sales, but Wharton was not to interfere with the sales. Wharton said "the business went on as before, except that I kept the memorandum (of sales). Mr. Moberley not receiving the moneys, told me to tell people purchasing that they

should account with the bank. I began to do so, and A. N. Sexton got huffy at this. I never had in my possession the document (a power of attorney to him from the bank)."

The Statute requires that if the mortgage "is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged," then it must be duly registered, and if not so registered, that it "shall be absolutely null and void as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith for valuable consideration."

And looking at all the cases in Robinson & Joseph's Digest. "Bills of Sale and Chattel Mortgages, 582 to 586, and the cases cited in the argument for the defendant, I am of opinion there was not a change of possession sufficient to maintain the bank title to the chattels, without registration of the mortgage, until the 5th of May, 1877, when the bank made a sale of the property.

Upon that day at any rate, and by that sale, which was public, and which the mortgagor opposed and forbid, the possession may, I think, be said to have been changed: *Ex parte Jay, In re Blenkhorn*, L. R. 9 Ch. 697, 703.

I think it has not been held that the actual change of possession must *invariably accompany* the execution of the mortgage, and must be continued from that time forward to be of any avail, although the mortgage must be "accompanied by an immediate delivery" of the things mortgaged.

The words of the Act, that the mortgage "which is not accompanied by an immediate delivery, and an actual and continued change of possession," shall be void as against purchasers and creditors, seem to require that the change of possession as well as the delivery of the goods should *immediately accompany* the mortgage, and should be continued from that time.

If immediate possession be not taken, the mortgagor may obtain credit as the owner of the goods, and if the mortgagee can, just before the sheriff seizes, take the goods

under his mortgage, all the mischief is done which it was the purpose of the statute to put an end to.

As a fact I think the bank did get possession on the 5th of May, 1877, but not before.

The executions which the sheriff then had bound the goods upon that day, as against the bank, so far as their title by actual possession is concerned.

But there is the further fact that the writ of attachment in insolvency issued on the 16th of May, 1877, against Sexton, the mortgagor, and the title of the assignee has been tried in this action as well as that of the execution creditors; and by that writ, under 38 Vic. ch. 16, sec. 83, D., the claims of the execution creditors were suspended, and the bank is entitled to a preference as against the assignee in insolvency by reason of their prior actual possession and title consummated on the 5th of May.

The chattel mortgage and assignment are not void by the 38 Vic. ch. 16, sec. 130, as it was not contended that Sexton was insolvent or unable to meet his engagements, or that either Mayor or the bank knew of the inability, or had any reason to believe, or knew of any such, or that they had probable cause for believing it, and it is certain that no such inability was public and notorious. Sexton contended throughout that he was quite solvent, but only pressed by the depression in the lumber trade.

If the bank title depend upon a title sufficient in law, by reason of a duly executed chattel mortgage, according to the statute, they are entitled, as before stated, to prevail over the execution creditors.

If the title depend merely upon the mortgage, as a common law conveyance, and not upon the statute, the bank, by reason of their possession on the 5th of May, 1877, eleven days before the attachment in insolvency issued, is entitled to take precedence over the assignee in insolvency, who takes precedence over the execution creditors, and thus the bank is enabled to avoid the claims of the execution creditors, which would otherwise have ranked before the claim of the bank.

It was next argued for the defendant that the title of the bank failed because, at the the time they received the four notes the notes were not stamped, and the bank did not stamp them for several days after receiving them, knowing them not to be stamped, and when the double stamps were put on by the bank, the cancellation was expressed to have been made on the 11th of May, 1876, to correspond with the dates of the notes, a day long anterior to the day of the actual cancellation.

The plaintiff argued that no one but a party to the notes could take such an objection.

The 31 Vic. ch. 9, sec. 4, D., requires that the person affixing such adhesive stamp shall, at the time of affixing the same, write or stamp thereon the date at which it is affixed, and such stamp shall be held *primâ facie* to have been affixed at the date stamped or written thereon; and any person wilfully writing or stamping a false date on any adhesive stamp shall incur a penalty of one hundred dollars for each such offence."

The 33 Vic. ch. 13, sec. 11, D., enacts that, "If any person in Canada makes . . . becomes a party to . . . any promissory note . . . chargeable with duty under this Act, before the duty (or double duty, as the case may be) has been paid, by affixing thereto the proper stamp or stamps, such person shall thereby incur a penalty of one hundred dollars, and save only in the case of payment of double duty, as in the next section provided, such instrument shall be invalid and of no effect in law or in equity, and the acceptance, or payment, or protest thereof shall be of no effect."

The 37 Vic. ch. 47, sec. 2, D., allows the holder of any such instrument to pay double duty, and by writing his initials on such stamps, "and the date on which they were affixed; and where in any suit or proceeding in law or equity, the validity of any such instrument is questioned by reason of the proper duty thereon not having been paid at all, or not paid by the proper party, or at the proper time, or of any formality as to the date or erasure of the stamps affixed.

having been omitted, or a wrong date placed thereon, and it appears that the holder thereof, when he became such holder, had no knowledge of such defects, such instrument shall be held to be legal and valid if it shall appear that the holder thereof paid double duty, as in this section mentioned, so soon as he acquired such knowledge * * * and if it shall appear in any such suit or proceeding to the satisfaction of the Court or Judge, as the case may be, that it was through mere error or mistake, and without any intention to violate the law on the part of the holder, that any such defect as aforesaid existed in relation to such instrument, then such instrument, or any endorsement or transfer thereof, shall be held legal and valid, if the holder shall pay the double duty thereon as soon as he is aware of such error or mistake."

Section 3, "Any bank or any broker who makes, draws, or issues, or negotiates, presents for payment, or pays, or takes, or receives, or becomes the holder of any instrument not duly stamped, either as a deposit, or in payment, or as a security, or for collection or otherwise, knowing the same not to be duly stamped, and who does not immediately, on making, drawing, issuing, negotiating, or presenting for payment, or paying, or taking, or receiving, or becoming the holder of such instrument, affix thereto and cancel the proper stamps, within the meaning of the Act 31 Vic. ch. 9, shall incur a penalty of five hundred dollars for every such offence, and shall not be entitled to recover on such instrument, or to make the same available for any purpose whatever, and any such instrument shall be invalid and of no effect in law or equity."

It was admitted by the bank manager that he cancelled the stamps by putting upon them a date several days anterior to the time of his affixing them. That is contrary to the 31 Vic. ch. 8, sec. 4, and subjected the party to a penalty for the "wilfully writing or stamping a false date," and it is contrary also to 37 Vic. ch. 47, sec. 2.

The bank also became a party to these notes before the duty was paid upon them, by means of which, unless the

bank were entitled to double stamp them, "such instrument shall be invalid and of no effect in law or in equity": 33 Vic. ch. 13, sec. 11.

The bank had knowledge of the notes not being stamped when they became the holder of them, and they did not, I think, pay the double duty as soon as they acquired such knowledge, nor did they fail to do it from mere error or mistake,—in which case, the notes cannot be held to be legal and valid: 37 Vic. ch. 47, sec. 2.

The bank took, received, and became the holder of these notes, which were not duly stamped, knowing that fact, and they did not, immediately on taking, receiving, and becoming the holder of the notes, affix thereto and cancel the proper stamps according to the 31 Vic. ch. 9, by which they incurred a penalty, and in consequence thereof, as sec. 3 of the last named Act declares, they "shall not be entitled to recover on such instrument or to make the same available for any purpose whatever, and any such instrument shall be invalid and of no effect in law or equity."

If the bank title is to rest only upon the efficacy of these four promissory notes which are mentioned in the chattel mortgage, it appears to me it must fail. There was not only a default to pay the double duty in due time, and a default duly to cancel the stamps, but there was an intentional false cancellation of them.

If the bank title can be rested upon the agreement which was made between the bank and Sexton, as contained in the letters of the 27th of March and the 27th of April, 1877, before mentioned, by which Sexton was to release his equity of redemption to the chattels in that mortgage, and also to the lands in other mortgages mentioned, and was to be released from all personal liability to the bank, and by which other things were to be done,—by which in fact a final settlement was come to between the bank and Sexton—and upon the execution of that agreement in all respects but the formal release of the equity of redemption to the chattels, and upon the subsequent taking possession by the bank of the chattels, as the absolute owners thereof,

and by selling them before the attachment in insolvency issued, then the bank may, nevertheless, be entitled to recover in this action.

And I think it may be so supported. The bank had manifestly the full and absolute equity to all the chattels covered by the mortgage after the making of that agreement, and their subsequent possession and sale of them was as absolute owners. The Court of Equity would, if necessary to the absolute title, compel Sexton to perfect his agreement by the execution of the formal part of it, the release of the equity of redemption of the chattels.

That release, too, was only a part of the general settlement in full of all transactions between the bank and Sexton, and so rests on a different consideration, and has a wider basis by far than the mere security for the payment of the four promissory notes.

There remains to be considered the questions as to whether the lumber on lot D passed, and the disposal of the rights of the parties to the machinery which was sold by the plaintiffs which was not in the mortgage, and the manner in which the issue should be formally disposed of according to the form of it upon the record.

The issue which was ordered to be tried was whether the goods seized by the sheriff under certain executions were, or some part of them was, at the time of such seizure the property of the bank as against the execution creditors.

If the execution creditors were entitled to succeed as against the bank, the verdict should have been for the creditors, although the whole of the goods would not have been required to satisfy the execution claims, and the bank would have taken the residue after the satisfaction of such claims.

The executions cover the whole of the goods, and it cannot be told until a sale what extent or quantity of goods in question will be necessary for the payment of the execution claims. The sheriff is therefore entitled to get the goods which he seized, and which the bank claimed as against the execution creditors.

It was a question of right which was being tried to the particular property, the plaintiffs affirming their right to the property, and the defendant denying it. It was not a question whether the bank, admitting or taking subject to the execution creditors, was entitled to the residue (if any) after satisfaction of the executions. There could be no objection to the entry of a general verdict for the defendant in such a case, because the execution claims are necessarily limited to the amount of them, and after their satisfaction the Court would direct, in the exercise of its discretion, the residue of the goods to be given over according to the facts appearing upon or found at the trial.

In that case the verdict would be for the defendant.

It would not be according to the issue to find the verdict in such a case for the plaintiffs, subject to the claims of the execution creditors, for that would be against the issue to be tried, and it would be finding it for the plaintiffs when it should in such a case be entered for the defendant.

In that case the finding would have been, and would be, in effect, a verdict for the defendant to the amount and extent of the execution claims; and although it was entered generally for the defendant, the plaintiff would get the benefit he was entitled to as appearing by the evidence, shewing a state of facts to entitle him to relief. The defendant, having a preference, had a right, as against the plaintiffs, to the whole goods.

The Court, as I have said, will see that the rights of the parties are attended to.

The trial is to inform the conscience of the Court: *Edwards v. English*, 7 E. & B. 564. And the equitable as well as the legal rights of the parties are to be considered: *Duncan v. Cashin*, L. R. 10 C. P. 554.

The verdict should therefore be corrected, as asked for by the rule, to a general verdict for the defendant, if, in my opinion, the execution creditors are entitled to prevail against the plaintiffs, which was the opinion of the learned Judge at the trial. But as the plaintiff, by the final settlement and taking possession of the goods, as before men-

tioned, got title before the assignee in insolvency, who got title before the execution creditors, they, and not the defendant, were entitled to the general verdict. It is therefore right, as it stands, for the plaintiff, so far as this point is concerned, by striking out the qualifying words, "subject to the amount of the executions in the Sheriff's hands, amounting to \$1,460.16."

As to the machinery, which was sold by the bank, and which is not covered by the chattel mortgage, I think the defendant is entitled to recover, because there is no evidence that such machinery was ever claimed by the bank until they sold it, or that Sexton ever acquiesced in its being the property of the bank, or assumed or considered it to have passed to the bank.

Then as to the lumber on lot D. That lot is not named in the schedule as that on which any part of the lumber mortgaged is conveyed; but certain other lots are particularly named on which the lumber conveyed was then piled.

The schedule describes "about 400,000 feet" as being upon these specified lots, whereas, as I understand the evidence, that quantity was not upon the the specified lots, but was as well upon lot D as upon the specified lots; and at the close of the description and quantity of lumber on the specified lots, these words are contained, "including all the lumber owned by W. S. Sexton." These words are sufficient at the common law to pass the lumber which was piled on lot D, but under the Chattel Mortgage Act, Rev. Stat. ch. 119, sec. 23, as against creditors and purchasers, such a general description would not be a "sufficient and full description thereof, that the same may be thereby readily and easily known and distinguished."

The lumber on lot D having therefore, as between the individual parties to the mortgage and assignment, passed to the bank, the bank, excepting as against creditors, had the right to deal with it as they did with the other lumber which was particularly described.

It was intended to be passed by Sexton under the mortgage, and he always treated it as being covered by

the bank security, and he did in fact give up his right to it upon the settlement before mentioned; and as the bank had it rightfully in possession before the attachment in insolvency issued, not only under their mortgage, but by the settlement made by Sexton, and with his entire assent, they are entitled to retain it.

For these reasons, I am of opinion that the verdict, as rendered, modified by the disallowance of the execution claims, as before mentioned, and modified also by the allowance to the defendant of the machinery sold and not covered by the mortgage, as before mentioned, should stand, and that the rule should be discharged.

HARRISON, C.J., concurred.

ARMOUR, J., took no part in the judgment, having been concerned in the case at the Bar.

Rule accordingly.

CRAIN V. THE TRUSTEES OF THE COLLEGIATE INSTITUTE
OF THE CITY OF OTTAWA.

Award—Appeal under 39 Vic. ch. 28, sec. 7, O.—R. S. O., ch. 50, sec. 192—41 Vic. ch. 6, sec. 3, O.—Construction.

Sec. 3 of 41 Vic. ch. 6, O., declares that the Legislature is not by that Act or the 40 Vic. ch. 6, O., to be deemed to have adopted the construction which may by Judicial construction or otherwise have been placed upon the language of any statutes included amongst the Revised Statutes.

Held, notwithstanding this enactment, that sec. 192 of ch. 50, R. S. O., being not only in words but in effect the same as sec. 7 of 39 Vic. ch. 28, O., repealed, but reenacted by it, must receive the same construction as as was placed upon the repealed enactment by the *Manufacturers and Merchants Fire Ins. Co. v. Atwood*, 28 C. P. 21, and therefore that there could be no re-hearing by the Court by way of appeal from the decision on an award made by a single Judge under the repealed enactment.

F. Osler applied to rehear a rule made by Wilson, J., setting aside the award of the arbitrator herein, and directing a new arbitrator to be appointed.

The action was on a building contract, by which the plaintiff agreed that he would furnish and provide all materials, and every article or thing necessary for the erection and completion of a new school house, to be erected on the lands of the defendants, in the city of Ottawa, together with all other buildings and works mentioned in the specifications, to the satisfaction of Walter Chesterton, the superintending architect, or such other architect as the defendants or their architect should appoint for that purpose, to be completed in a first-class workmanlike manner, to the satisfaction in all respects of the said Chesterton, or of such other architect as aforesaid, at the times following, &c., &c.

The action was for the balance of money which the plaintiff claimed to be due to him.

All matters in difference in the action between the parties were, on the application of the plaintiff, and with the consent of the defendants, referred by an order in Chambers, dated 29th September, 1876, to *Robert Lyon*, Esquire, the junior Judge of the county of Carleton.

The award was to be subject to the Common Law Procedure Act, section 158, and to the other provisions of the 39 Vic. ch. 28, O. The arbitrator, on the 4th of August,

1877, and within the time appointed, made his award, by which he directed the defendants to pay to the plaintiff the sum of \$14,652, in full of all demands in the cause, and to pay to the plaintiff the costs of the reference and of the award, the costs of the action abiding the result of the award.

On the 21st of August, 1877, the defendants gave notice that a motion would be made to this Court on the 7th of September, by way of appeal from the award, report, or certificate made in this cause on the 4th of August, and filed on the 7th of August, on several grounds which it is unnecessary here to set out,

The appeal was argued twice before Wilson, J., sitting for the full Court, who finally gave judgment, as above indicated.

On the 3rd June 1878, *Kerr*, Q. C., (*Cassels* with him,) appeared for the defendants.

There can be no re-hearing of the single Judge's decision: *Manufacturers and Merchants Fire Ins. Co. v. Atwood*, 28 C. P. 21. This is not Court business under the Statute. If there be a right of review, it must be by the Court of Appeal: 40 Vic. ch 7; R. S. O., ch. 38, sec. 18, ch. 39 secs. 20, 21.

Osler, contra. The full Court may clearly review the decision of a single Judge: R. S. O., ch. 165, sec. 20, sub.-sec. 19. The Revised Statutes are not new Acts: 41 Vic. ch. 6.

29th June, 1878. HARRISON, C. J.—The order of reference in this case is dated 29th September, 1876.

Although by consent, it was made subject to the provisions of 39 Vic. cap. 28, Ont., which had been passed on the 10th February previously.

The effect was, that the award, if any, to be made thereunder, was subject to the appeal given by 39 Vic. cap. 28, Ont. (See sec. 10.)

That appeal, by section 7 of the Act, was "to the Court in which the said action was begun, and may be heard before

and decided by a Judge of either of the Superior Courts of Common Law, in or out of Term."

The Court of Common Pleas, in *Manufacturers and Merchants Fire Ins. Co. v. Atwood*, 28 C. P. 21, held, that under these words there could be no re-hearing in the Court by way of appeal from the decision of the Judge by whom the appeal is in the first instance decided.

It is desirable that the practice of the two Superior Courts of Common Law shall be as nearly as possible uniform.

We accept the decision of the Court of Common Pleas as being a correct construction of the language of the Statute, and this without expressing any opinion of our own on the point. We were asked, in argument, to disregard the statute and the interpretation placed upon it, because the statute has been repealed and re-enacted by sec. 192 of the present C. L. P. Act, and the Legislature, in sec. 3, of 41 Vic. ch. 6, Ont., has declared that "the Legislature is not, by reason of the passing of this Act, or of the Act passed in the fortieth year of Her Majesty's reign, intituled an Act respecting the Revised Statutes of Ontario, to be deemed to have adopted the construction which may, by judicial decision or otherwise, have been placed upon the language of any of the statutes included amongst the Revised Statutes."

The 40 Vic. cap. 6, which gives legislative effect to the Revised Statutes of the Province, in sec. 10 declares, that "the said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation, and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted." But this declaration is subject to what is enacted in sub-sec. 3 of the same section: "If upon any point the provisions of the said Revised Statutes are not in effect the same as those of the repealed Acts and parts of Acts for which they are substituted, then, as respects all transactions, matters, and things subsequent to the time when the said Revised Statutes take effect, the provisions contained in them shall prevail, but as

respects all transactions, matters, and things anterior to the said time, the provisions of the said repealed Acts and parts of Acts shall prevail."

It is, also, by sub-sec. 2 of the same section declared, that "the various provisions in the Revised Statutes corresponding to and substituted for the provisions of the Acts and parts of Acts so repealed, shall, where they are the same in effect as those of the Acts and parts of Acts so repealed, be held to operate retrospectively, as well as prospectively, and to have been passed upon the days respectively upon which the Acts and parts of Acts so repealed came into effect."

The Legislature has, in sec. 192 of cap. 50, of the Revised Statutes, used the same language as used in sec. 7 of 39 Vic. ch. 28, Ont., and we see nothing in the enactment to indicate on the part of the Legislature any intention to declare any different or other construction of the Act than that previously placed by the Court of Common Pleas on the repealed statute.

In the absence of some such intention being expressed by the Legislature, we cannot do otherwise than accept the construction placed upon the words of the statute by a competent tribunal of co-ordinate jurisdiction.

The business of the Legislature under the constitution is, to make laws, and of the Courts to interpret the laws when made.

If the Legislature, when repealing and re-enacting a law upon which the Courts have placed a judicial construction, be dissatisfied with such construction, the least the Legislature can do is to say so, or to manifest its dissatisfaction by change of language.

We cannot, in the absence of appropriate language, surmise that the Legislature in any case design to disregard the decisions of the Superior Courts of the country, whose duty and business it is to expound the laws of the country.

The interpretation which we place upon the re-enacted statute, where the re-enactment is without modification of the original statute, is not the construction of the Legis-

lature, or of the Courts adopted by the Legislature, but what we take to be the true meaning of the language used, as that meaning has been declared by one of the constitutional tribunals of the country

Sir W. M. James, in *Ex parte Campbell*, L. R. 5 Ch. 703, 706, said: "Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them."

The Legislature of Ontario, in the Act of 1878, simply protest that in such a case they are not to be deemed as having adopted the judicial construction of the language used; but, where there is no change of language, where the repealed and the substituted Act are in effect the same, the judicial construction ought to prevail.

The question is, as to the meaning of the words used in the Act, and not whether the Legislature has adopted the judicial construction of them; and if it appear that a Superior Court of competent jurisdiction has given to the words used, although used in a prior Act, a particular interpretation, it is only right for a Court of co-ordinate jurisdiction to accept that interpretation, and leave it to the Legislature, if it see fit, in the exercise of its wisdom, to alter the law.

Section 192 of cap. 50 of the Revised Statutes, Ont., is not only in effect but in words the same as sec. 7, of 39 Vic. ch. 28, Ont., and we must therefore give to it the interpretation which the repealed enactment received.

If it were not in effect the same, we should have to consider whether the parties to this reference would be bound by it.

The objection to the re-hearing is, in our opinion, well taken.

ARMOUR, J., concurred.

Judgment accordingly.

DENISON V. SMITH.

[*Railway—Subscription for stock—Insolvency—Property passing.*

The defendant was named as one of the provisional directors of the Toronto, Grey, and Bruce R. W. Co., by their Act of Incorporation, and was afterwards elected and acted as director thereof, having subscribed for stock to the extent of \$1,000, on which he paid, partly in money and partly by certain allowances made for his services as such director and otherwise, the sum of \$400. Subsequently to this, defendant made an assignment under the Insolvent Act of 1869. Before doing so, however, he had procured the execution by the required majority of his creditors of a deed of composition and discharge, apparently under sec. 94 of the Act. The plaintiff, as a creditor of the same company, sued out a writ of *sci. fa.* against the defendant to compel payment to him of the balance due upon the said stock. The defendant pleaded that he was not a shareholder in the said company, his contention being that the property in the said stock had passed to the assignee. It did not appear whether or not the assignee had accepted or rejected this stock, or had done any act beyond accepting the assignment made to him. The defendant had obtained his discharge in the usual way, the unpaid balance upon the stock, however, not having been scheduled as a liability of defendant, and no claim having been proved in respect of it :

Held, that the plaintiff was entitled to recover, and that the property in the said stock had not passed to the official assignee.

Sci. fa. on a judgment against the Toronto, Grey, and Bruce Railway Company, for the sum of \$3,154.88 damages, and \$18.51 costs, alleging that the defendant was the holder of ten shares of the capital stock of the Toronto, Grey, and Bruce Railway Company, and that \$600 remained unpaid in respect thereof, and requiring him to shew cause why the plaintiff should not have execution against him for the amount in question:

The defendant appeared, and pleaded that he was not, at the time of the recovery of the said judgment, nor was he at the commencement of this suit, the holder of the said shares as alleged.

Issue.

The cause was tried before Hagarty, C. J., at the last Fall Assizes for the city of Toronto.

It appeared in evidence that the defendant subscribed the stock book of the company for ten shares, of one hundred dollars each, and paid ten per centum thereon : that he

acted as a Provisional Director: that he was afterwards elected a director, and acted as such: that the sum of \$300, which the defendant was said to have "earned as director's fees for attending meetings of the board, was carried to the credit of calls made upon his shares, although he was not very willing that this should be done:" that calls were made, payable as follows:

10 per cent.....	February 16, 1870.
10 "	May 16, 1870.
10 "	July 16, 1870.
10 "	September 28, 1870.
10 "	January 20, 1872.
10 " ..	March 26, 1872.
10 "	November 16, 1872.
10 " ...	January 16, 1873.
10 "	March 24, 1873.

It further appeared that the defendant on the 23rd of September, 1870, made a voluntary assignment under the provisions of the Insolvent Act of 1869, in the form C, to that Act appended, to William Thomas Mason, an official assignee, as interim assignee, which assignment, executed by him and by William Thomas Mason, was put in and admitted.

A deed of composition and discharge, dated the 4th day of July, 1870, was put in and admitted, and it was also proved that this deed was confirmed by the Judge in November, 1870, and that the composition therein provided for had been fully paid. No transfer of the defendant's shares to the assignee was ever made in the books of the company, the amount unpaid thereon was not set down in the list of the defendant's liabilities in insolvency, nor were the company parties to the deed of composition and discharge, nor did they receive any composition, nor, at the date of the assignment, were any calls in arrear, the previous calls having been paid, if they could be so paid, by the defendant's "earnings" as a director.

Upon these facts the learned Chief Justice held that the defendant was still a shareholder of the Company, and entered a verdict for the plaintiff for \$600, the amount unpaid on the said shares.

In Michaelmas Term last *A. H. Meyers* obtained a rule *nisi* to set aside the verdict and enter it for the defendant; or for a new trial on the law and evidence, and on the ground that the defendant's plea was proved, and the evidence clearly shewed that defendant was carrying on business in Toronto and in 1870 made an assignment under the Act of 1869, vesting all his estate real and personal in the assignee, who accepted the same, and the said estate was never reconveyed to defendant.

13th February, 1878, *Kennedy* shewed cause. The calls on the stock not being made, there was no debt due under the 56th section of the Insolvent Act, 1869, and therefore the deed of composition and discharge as to this debt was ineffectual: See sec. 98, also *South Staffordshire R. W. Co. v. Burnside*, 5 Ex. 129. Owing to the want of compliance with secs. 71 and 74 of ch. 66 of Consolidated Statute of Canada, giving instructions as to transmission of shares by death or bankruptcy, the assignment is not complete: *Turner v. Richardson*, 7 East 335; *Re London Provincial Telegraph Co.*, L. R. 9 Eq. p. 653; *Toppin v. Field*, 4 Q. B. 386; *Hastie's Case*, L. R. 4 Ch. App. 274; *Martin's Patent Anchor Co. v. Morton*, L. R. 3 Q. B. 398. Owing to the debt not being scheduled there was no release from the liability: *King v. Smith*, 19 U. C. C. P. 319; *Standard Bank of Canada v. Johnstone*, 42 U. C. R. 16; *General Discount Co. v. Stokes*, 17 C. B. N. S. 765. As to what passes under an assignment under the Insolvent Act, see sec. 10, 32 & 33 Vic. ch. 16; *Shelford's Law of Bankruptcy*, p. 350. Owing to the direction in the deed of composition and discharge, which was executed prior to the deed of assignment, that on the execution by the creditors representing the necessary proportion and amount, the assignee was to reconvey the estate to the insolvent, the stock never vested in the assignee, or, if it momentarily did, it immediately under that direction revested in the defendant. Nothing further was necessary to give the defendant complete control of the stock, and it stood in his name on the books of the company.

Ferguson, Q. C., contra. It is admitted that the defendant was at one time a shareholder, but by the assignment in insolvency the property in the shares passed to the assignee by force of the provisions of the Insolvent Act of 1869, and this, although it was not shewn that the assignee had done any act to indicate an election by him to accept the shares beyond his execution of the assignment and acceptance of the estate as an assignee in Insolvency. Though the tendency of the older authorities under the English Bankruptcy Acts is to show that a *damnosa hæreditas* does not pass unless the assignee elected to accept it, these authorities are not properly applicable. He cited *McGee v. Rankin*, 29 U. C. R. 257; *White v. Elliott*, 30 U. C. R. 253; *Smith v. Commercial Union Ins. Co.*, 33 U. C. R. 529; *Cartwright v. Glover*, 2 Giff. 620; *Crofts v. Peck*, 1 Bing. 354; *Mackley v. Pattenden*, 1 B. & S. 178; Consol. Stat. C., pages 773 and 774; Consol. Stat. C., page 819, ch. 70; Insolvent Act of 1869, secs. 10 and 29; and distinguished *Martin's Patent Anchor Co. v. Morton*, L. R. 3 Q. B. 398.

7th September, 1878. ARMOUR, J.—The Toronto, Grey, and Bruce Railway Company was incorporated by the Act of the Ontario Legislature, passed in the 31st year of Her Majesty's reign, chaptered 40.

By section one of that Act, the defendant is declared to be a corporator of the company.

By section six he is declared to be a provisional director of the company, and by section eighteen it is provided that "no person shall be qualified to be elected a director by the shareholders unless he be a shareholder holding at least ten shares of stock in the company, and unless he has paid up all calls thereon."

The facts that the defendant was a corporator, a provisional director, and acted as such, that he subscribed the stock book for ten shares of the capital stock: that he paid ten per centum thereon: that he was elected a director and acted as such: that he allowed, although

unwillingly, his "earnings" as a director to go in payment of calls upon these shares, seem to me sufficient to enable me to hold that the defendant became a shareholder in the company: *Portal v. Emmens*, L. R. I C. P. D. 201 & 664; *Lake Superior Navigation Co. v. Morrison*, 22 C. P. 217.

The next question to be considered is, what was the effect of the proceedings taken by the defendant in insolvency upon his ownership of these shares?

From the fact that the deed of composition and discharge is dated July 4th, 1870, and the assignment not until the 23rd of September thereafter, it is reasonable to infer, although unnecessary, in the view I take of the case, to do so, that the defendant was taking advantage of section 94 of the Insolvent Act of 1869, which provides that a deed of composition and discharge "may be invoked and acted upon under this Act, although made either before, pending, or after proceedings upon an assignment"; and that the assignment was made by the defendant, not with any intention of passing any property thereunder, but for the sole purpose of enabling his deed of composition and discharge to be confirmed under the said Act.

Section 7 of the Insolvent Act of 1869, provides that the deed or instrument of assignment may be in the form C to that Act appended, and section 10 provides that "the assignment shall be held to convey and vest in the interim assignee in the first instance the books of account of the insolvent, all vouchers, accounts, letters, and other papers and documents relating to his business, all moneys and negotiable papers, stocks, bonds, and other securities, as well as all the real estate of the insolvent, and all his interest therein, whether in fee or otherwise, and also all his personal estate, and movable and immovable property, debts, assets, and effects, which he has or may become entitled to at any time before his discharge is effected under this Act, excepting only such as are exempt from seizure and sale under execution by virtue of the several statutes in such case made and provided; and if

an assignee be subsequently appointed, or if by the failure of election the interim assignee becomes assignee, such assignee shall have the same rights in and to the whole of such estate and effects as were previously held under this Act by the interim assignee;" and in case of a compulsory liquidation, by section 29, upon the appointment of the assignee, the guardian shall immediately deliver the estate and effects in his custody to such assignee, and by the effect of his appointment the whole of the estate and effects of the insolvent, whether real or personal, movable or immovable, as existing at the date of the issue of the writ, and which may accrue to him by any title whatsoever up to the time of his discharge under this Act, and whether seized or not seized under the writ of attachment, shall vest in the said assignee in the same manner, to the same extent, and with the same exceptions as if he had been duly appointed assignee to such insolvent under a voluntary assignment of his estate and effects, executed by the insolvent to an interim assignee, and such estate and effects had been duly transferred to him as hereinbefore provided."

In *Bourdillon v. Dalton*, 1 Esp. 233, the question was, whether the bankrupt, having been in possession under a lease rendering rent, and which had been assigned under his commission to the defendants as his assignees, they as such were liable for the rent accrued since the bankruptcy. Lord Kenyon said: "The assignees certainly take this lease under the assignment, but if it be what the civil law calls *damnosa hæreditas*, an interest producing nothing to the bankrupt estate, they may abandon it. An assignee can only be charged by virtue of possession. There is no proof that the defendants ever took possession of the premises disposed of in this lease, and as they are not compelled to take it in their character of assignees, the action cannot be maintained against them."

In *Turner v. Richardson*, 7 East 335, where the question was, whether the assignees of a bankrupt had accepted a term of years held by the bankrupt so as to make them

liable as assignees on the covenant contained in the lease, Lord Ellenborough said: "Now, it has been decided that assignees of a bankrupt are not bound to take what Lord Kenyon called a *damnosa hæreditas*, property of the bankrupt, which so far from being valuable, would be a charge to the creditors." He also said, in the course of the argument: "All that does not vest in the assignees, must remain in the bankrupt."

Wheeler v. Bramah, 3 Camp. 340, is to the same effect.

These cases were followed and approved by the Court of Queen's Bench, in the considered judgment in *Copeland v. Stephens*, 1 B. & Ald. 593, in which it was held that the general assignment of a bankrupt's personal estate under his commission did not vest a term of years in the assignees, unless they did some act to manifest their assent to the assignment as it regards the term and their acceptance of the estate. Lord Ellenborough there says: "An assignment by commissioners of a bankrupt is the execution of a statutable power given to them for a particular purpose, viz., the payment of the bankrupt's debts. Nothing passes from them, for nothing was previously vested in them. Whatever passes, passes by force of the statute, and for the purpose of effecting the object of the statute; and therefore the assignees of a bankrupt are not bound to accept a term of years that belonged to the bankrupt, subject to the rent and covenants, for the object of the statute and of the assignment being the payment of the bankrupt's debts, and the assignees, under the commission, being trustees for that purpose, the acceptance of a term which, instead of furnishing the means of such payment, would diminish the fund arising from other sources, cannot be within the scope of their trust or duty." And he puts these questions: "first, does it pass the estate immediately to the assignees, defeasible upon their actual refusal to accept a renunciation of it; or secondly, does it pass the estate immediately to the assignees, defeasible upon their neglect or forbearance to do some act manifesting their acceptance of it; or thirdly, is its effect suspended until

acceptance ;" and he concludes that its effect is suspended until acceptance, and decides that if the operation of the deed of assignment be suspended, the estate must necessarily remain in the bankrupt during the suspension, for it cannot be in abeyance, and must exist in some person.

The principles laid down in that case, although the question was, as to a term of years, apply equally to any other property of the bankrupt which would entail a burden on the bankrupt's estate, and have been followed by the cases of *Goodwin v. Noble*, 8 E. & B. 587 ; *Mackley v. Patten-den*, 1 B. & S. 178 ; *Bishop v. Trustees of Bedford Charity*, 1 El. & El. 697 ; and were applied to railway shares by the Court of Exchequer, in *The South Staffordshire R. W. Co. v. Burnside*, 5 Ex. 129.

Vice Chancellor Gifford, however, held in *Cartwright v. Glover*, 2 Giff. 620, that under the 145th sec. of 12 & 13 Vic. ch. 106, a leasehold estate vested in the assignees until they elected not to take it. See, also, *Metropolitan Bank v. Offord*, L. R. 10 Eq. 398.

It was held in *Doe Palmer v. Andrews*, 4 Bing. 348, Best, C. J., *diss.*, that under the Insolvent Act, 1 Geo. IV. ch. 119, a term of years vested in the provisional assignee ; and the Court distinguished the effect of that Act from the bankrupt laws, because in the former the insolvent assigned his estate voluntarily by his own deed, and in the latter, the commissioners did it for him.

It is difficult for me to see what difference this could make as to the vesting effect of the assignment upon the assignee ; and if this distinction were carried into the Insolvent Act of 1869, the vesting effect upon the assignee under sec. 7, would be different from that under sec. 29. See, also, *Lindsay v. Limbert*, 12 Moore 209 ; *Topham v. Dent*, 6 Bing. 515 ; 1 & 2 Vic. ch. 110 ; *Bishop v. Trustees of Bedford Charity*, 1 El. & El. 697 ; *Levi v. Ayers*, L. R. 3 App. Ca. 842.

In *Magee v. Rankin*, 29 U. C. R. 257, this Court followed the decision in *Doe Palmer v. Andrews*, and held that under the Insolvent Act of 1864, a term of years vested in the assignee by a voluntary assignment under that Act.

Assuming, however, that under the Insolvent Act of 1869, property that will be a burden to the insolvent's estate passes to the assignee under a voluntary assignment without any election by the assignee to accept it, what effect had the defendant's assignment upon these shares? All that it could pass to the assignee was the beneficial interest in them, and the right to the assignee to have his name substituted for the name of the defendant in the books of the company as the holder of them, and upon the completion and fulfilment of the deed of composition and discharge, this beneficial interest passed back to the defendant, the defendant never ceasing to be the legal holder of these shares. Section 2 of the Act incorporating the Toronto, Grey, and Bruce Railway Company incorporates in that Act the sections of the Railway Act, Consol. Stats. Can., cap. 66, with respect to shares and their transfer, and it seems to be clear that it is by that mode alone pointed out in these sections that shares in the company can be transferred. It also seems to be well settled that the person who appears on the books of the company as the holder of shares is liable for calls thereon, and to an action by a creditor for what is unpaid thereon, so long as his name so appears; and if his shares have been transmitted by sale, or by his insolvency, the only mode by which he can be freed from such liability is by having the name of his vendee or assignee substituted for his name on the books of the company as the holder of the shares so transmitted: *Midland Railway Company v. Gordon*, 16 M. & W. 804; *McEuen v. West London Wharves and Warehouses Company*, L. R. 6 Chy. App. 655; *In re London and Provincial Telegraph Company*, L. R. 9 Eq. 653; *Hastie's Case*, L. R. 4 Chy. App. 274; *Blackburn v. Lawson*, 2 App. R. 215; *Brock v. Ruttan*, 1 C. P. 218.

I think the rule should be discharged.

WILSON, J., concurred.

HARRISON, C. J., was absent through indisposition, and took no part in the judgment.

Rule discharged.

CAMERON V. GILCHRIST.

*Dower—Action against three defendants—Claim of damages against one—
 Averment of seisin—Pleading.*

In a declaration in dower against three defendants, and suggesting that while one defendant had not, another had appeared, and acknowledged the tenancy of the freehold, and consented to the demandant having judgment, and going on to declare against the third defendant, claiming damages for detention of dower, the third defendant demurred, on the ground that as the action was against three defendants, the plaintiff could not recover damages for detention of dower against him alone.

Held, affirming the judgment of GWYNNE, J., that the declaration was good, and that the objection was not the subject of demurrer, but, if a good objection, only a ground for moving to set aside the declaration for irregularity.

Held, also, that it was not necessary to allege that the demandant's husband had died seised.

DOWER.

Declaration. Clementina Cameron, widow, who was the wife of Alexander Cameron, deceased, by Hector Cameron, her attorney, demands against Janet Gilchrist, Neil Gilchrist, and the Ontario Loan and Savings Company, who have been summoned by virtue of a writ of summons under the Dower Procedure Act of Ontario, the third part of lot number seven, in concession "A" of the township of Mara, in the county of Ontario, as her dower. And the demandant suggests and gives the Court to understand and be informed that the said Janet Gilchrist has not appeared to the said writ though duly notified so to do, as by the endorsement thereon appears. And the demandant further suggests and gives the Court to understand and be informed that the Ontario Loan and Savings Company have appeared to the said writ, and have acknowledged that they are tenants of the freehold of the said lands, and have consented that the demandant may have judgment for her dower therein, and may take the proceedings authorized by the Dower Procedure Act of Ontario, aforesaid, to have the same assigned to her. And the demandant, by her attorney aforesaid, declares against the said Neil Gilchrist, who has appeared to the said writ, for the dower of the said Clementina Cameron, of the endowment of Alexander

Cameron, deceased, heretofore her husband, whereof she has nothing, and also for damages for the detention from her of her dower in the said lands from the twenty-first day of March, A.D. 1877; and the said demandant claims one thousand dollars.

Demurrer, as to so much of the said declaration as charged the defendant with damages for detention of dower, on the ground that, as the action was brought against the defendant Neil Gilchrist and two other defendants, the plaintiff therefore could not recover damages for detention of dower from the defendant Neil Gilchrist alone. 2. That the declaration did not aver that the plaintiff's husband died seized of the said lands.

The case was argued before Gwynne, J., who gave judgment overruling the demurrer, whereupon the defendant appealed to the full Court.

On the 27th May, 1878, *Bethune*, Q. C., appeared for the appellant, citing *Linfoot v. Duncombe*, 21 C. P. 484; *Park on Dower*, 130, 138; *Draper on Dower*, 60; *Jones v. Jones*, 2 C. & J. 601.

H. Cameron, Q. C., contra, referred to Rev. Stats. O., ch. 55, sec. 19.

7th September, 1878. ARMOUR, J.—I think the declaration good in substance, and that the judgment of Gwynne, J., must be affirmed.

The first objection taken to it is not, in my opinion, the subject of a demurrer, but if a good objection at all only a ground for moving to set the declaration, which is good in itself, aside for irregularity.

A summons to set aside this declaration on this ground was in fact taken out, and argued before my brother Wilson in Chambers, 7 Pr. Rs. 184, who, feeling bound, sitting in Chambers, by the decision in *Linfoot v. Duncombe*, 21 C. P. 484, the effect of which decision is to prevent the plaintiff's declaring against the defendants, the

Ontario Loan and Savings Company, discharged the summons.

Had the defendant desired the opinion of this Court as to the alleged irregularity, he might have obtained it by appealing against my brother Wilson's order.

But I do not think, looking at the fact that by section 7 of the Dower Procedure Act, Rev. Stats. Ont., cap. 55, the writ of summons must be addressed "to the person in actual possession of the land out of which dower is claimed, and to every other person who is tenant of the freehold of the the same land," and that by section 26 of the same Act "the several enactments in the Common Law Procedure Act relative to pleas, demurrers, replications, and subsequent pleadings, and the periods appointed within which the same must be pleaded, and in which notice of trial must be given and countermanded, and as to amending pleadings, and as to practice not herein provided for, and making all or any other amendments, and as to the authority of the Court or of a Judge in such matters, and also the rules of Court from time to time in force relative to pleadings and practice, shall, so far as they can be made applicable and are not at variance with this Act, be in force, and apply to and regulate the course and practice of pleading and procedure in actions of dower," that this declaration is irregular or bad for being against Neil Gilchrist alone, or for claiming damages against him alone.

By section 19 of the said Act he has by appearing to the action, and not denying that he was tenant of the freehold, admitted that he was such tenant, and cannot afterwards be allowed to deny the same; and the appearance and acknowledgment by the defendants, The Ontario Loan and Savings Company, that they were tenants of the freehold, cannot be invoked by him to relieve him from such his admission, and from the consequences thereof. See *Teal v. Jones*, 2 Pr. Reps. 63. Nor is the second ground of objection to the declaration a valid one. Prior to the Dower Procedure Act, it never was necessary to the recovery of damages that the facts and circumstances

entitling the demandant to damages for the detention of her dower should be alleged in the declaration, and there is nothing in that Act to make it necessary now.

The 25th section of the Act prescribes a form of declaration, and the declaration in this case substantially follows that form.

Judgment will therefore be for the demandant.

HARRISON, C. J., concurred.

Judgment accordingly,

REGINA V. LAKE.

Conviction under 37 Vic. ch. 32, O., for "selling liquor without a license," where Temperance Act in force—Constitutionality of 40 Vic. ch. 18, sec. 30, O.

The proper construction of 40 Vic. ch. 13, is either that a wholesale license must be taken out in municipalities where the Temperance Act of 1864 is in force, for the quantities to be sold therein under that Act, and making a sale thereof without license a contravention of the 24th and 25th secs. of 37 Vic. ch. 32, O., as a selling by wholesale without license; or as providing in addition that a sale in such municipalities of the quantities prohibited by the Temperance Act should be a contravention of the said 24th and 25th sections, as a selling by retail without license.

Where, therefore, the defendant was convicted for selling liquor by retail without a license in a municipality where the Temperance Act was in force. *Held*, reversing the formal judgment of WILSON, J., that the conviction was invalid, and must be quashed, for if the former were the intention of the Legislature, then the conviction was bad, as it was for selling by retail under a provision of the License Act not in force where the conviction was made; and if the latter, the Legislature were exceeding their powers in directly legislating on criminal law, and enacting criminal procedure for the punishment of offences against the Temperance Act.

THIS was a motion by way of appeal from the judgment of Wilson, J., in Chambers, discharging an application for a writ of *habeas corpus* to discharge the defendant from the custody of the sheriff of the county of Prince Edward, committed under a conviction and warrant for selling intoxicating liquor contrary to section 24 of the Act entitled, "An Act to amend and consolidate the law for the sale of fermented and spirituous liquors."

The conviction was, that the defendant "on the 31st July, 1877, at the town of Picton, in the premises occupied by him, did sell intoxicating liquor, to wit, one glass of strong beer, being malt liquor, without the license therefor by law required, and being a violation of the 24th section of the Act entitled, 'An Act to amend and consolidate the law for the sale of fermented and spirituous liquor.' (See 37 Vic. ch. 32, O.)" &c.

The judgment of the learned Judge is reported in 7 P. R. 215, where the facts are fully stated.

February 8, 1878. No cause having been shewn, *Ferguson*, Q. C., and *Burdett*, supported the rule. The argument was the same as before the learned Judge in Chambers. The following additional authorities were referred to: *Regina v. Roddy*, 41 U. C. R. 291; *Copley v. Burton*, L. R. 5 C. P. 489; *Clarke's Criminal Law*, 450, 451; *Bancroft v. Mitchell*, L. R. 2 Q. B. 549; *Michell v. Brown*, 1 E. & E. 267; *Regina v. Hoggard*, 30 U. C. R. 152; *Re Lucas and McGlashan*, 29 U. C. R. 81; *Bross v. Huber*, 18 U. C. R. 282; *Regina v. French*, 34 U. C. R. 403.

March 18, 1878. ARMOUR, J.—All the facts and circumstances in any way affecting this conviction, and all the questions raised as to its validity, have been so fully set forth and discussed in the judgment appealed from that I shall content myself by stating as shortly as possible the conclusion at which I have arrived regarding it.

The principal question as to its validity seems to me to turn upon the construction to be placed upon 40 Vic. ch. 18, sec. 30, and upon the power of the Local Legislature to enact it.

It is quite clear that the Legislature intended either to confine that section to requiring a wholesale license to be taken out for the sale of liquor in the quantities allowed, to be sold under the provisions of the Temperance Act of 1864 in municipalities where that Act is in force, and to providing that a sale in such municipalities of such quan-

tities without such license should be a contravention of 37 Vic. ch. 32, secs. 24 and 25, as a selling by wholesale without license; or they intended, not only to do that, but also to provide that a sale in such municipalities of quantities prohibited by law to be sold therein by the Temperance Act of 1864, should be a contravention of 37 Vic. ch. 32, secs. 24 and 25, as a selling by retail without license, and that too, although they had already provided by 39 Vic. ch. 26, sec. 27, that no license to sell by retail should be granted to take effect in such municipalities.

If the former only was the intention of the Legislature then the conviction in question is bad, for it is for selling by retail under a provision of the License Act not in force where the conviction was made: *Graham v. McArthur*, 25 U. C. R. 478.

If the latter was their intention I think that they were exceeding their powers. They were by so doing directly legislating upon criminal law and enacting criminal procedure for the punishment of offences against the Temperance Act of 1864.

In my opinion the rule should be made absolute, except in so far as it seeks to quash the warrant of commitment which must stand as a protection to the officers who acted under it.

HARRISON, C.J., concurred.

WILSON, J., said he also concurred, because the judgment given by the Court was the judgment he would have given while sitting alone if he had been obliged to give a conclusive judgment. He, in fact, while the case was before himself left matters as they were, and referred the cause to the full Court.

Rule accordingly (a).

(a) The delay in reporting this case has arisen from its having been mislaid before being handed to the present Reporter.

MEMORANDA.

During Easter Term, the following gentlemen were called to the Bar :

THOMAS GRAVES MEREDITH, THOMAS PERCIVAL GALT, OLIVER RICHARD MACKLEM, DONALD MALCOLM CHRISTIE, TREVELYAN RIDOUT, DAVID BURKE SIMPSON, PETER JAMES MILLS ANDERSON, JOHN AUSTIN WORRELL, GEORGE WASHINGTON WELLS, JAMES CRAIG, JOHN NICHOLLS, WILLIAM GEORGE MURDOCK, ALFRED MACDOUGALL, HENRY RYERSON HARDY, FREDERICK VAN NORMAN, AUGUSTUS HENRY FRASER LEFROY, THEODORE KING.

IN THE

COURT OF QUEEN'S BENCH

AND THE

COURT OF COMMON PLEAS.

Regulae Generales.

Easter Term, 41 Victoria.

In the matter of JAMES GEORGE CURRIE, Gentleman,
one of the Attorneys of this Honourable Court :

In this Term, May 20, 1878, a rule was made absolute,
ordering the name of the said J. G. Currie to be struck
off the Rolls of this Honourable Court, for default in the
payment of certain mortgage moneys received by him.

It is ordered that the real representative acting under
the Act respecting the partition and sale of real estate,
(Revised Statutes of Ontario, ch. 101,) shall, in the case of
proceedings being instituted in the Court of Queen's Bench
or Common Pleas, or a County Court, be entitled to demand
and receive for all services performed by him under the
said Act, the same fees, as near as may be, which are allowed
by the Court of Chancery to local writers or special ex-
aminers for similar services.

(Signed) JOHN H. HAGARTY.
ROBERT A. HARRISON.
THOMAS GALT.
J. D. ARMOUR.

Thursday, 6th June, 1878.

IN THE COURT OF QUEEN'S BENCH.

Regulae Generales.

Easter Term, 41 Victoria.

On Thursday, the 6th day of June, A.D., 1878, a rule of Court was made under 39 Vic. ch. 8, sec. 5, O., dispensing with the Sittings of the Court of Queen's Bench during the time appointed for holding Trinity Term.

During Trinity Term, the following gentlemen were called to the Bar :

HENRY PIGOTT SHEPPARD, ISAAC CAMPBELL, ALLEN BRISTOL AYLSWORTH, RICHARD DULMAGE, HARRY RATCHER BECK, MATTHEW WILSON, WILLIAM HENRY FERGUSON, WILLIAM EDWIN HIGGINS, JAMES CARRUTHERS HEGLER, FREDERICK WILLIAM PATTERSON, EUGENE LEWIS CHAMBERLAIN, MAXFIELD SHEPPARD, NEIL A. RAY.

SITTINGS IN VACATION

AFTER TRINITY TERM, 1878.

IN RE YEOMANS ET UX. AND THE CORPORATION OF THE COUNTY OF WELLINGTON.

*Property abutting on highway—Raising of highway—Compensation—36 Vic.
c. 48, sec. 373, O., (R. S. O. ch. 174, sec. 456.)*

The owners of property abutting upon a public highway were held entitled to compensation from the municipality under the Municipal Act of 1873, 36 Vic. ch. 48, sec. 373, (R. S. O. ch. 174, sec. 456), for injury sustained by reason of the municipality having, for the public convenience, raised the highway in such a manner as to cut off the ingress and regress to and from their property abutting upon the highway, which they had formerly enjoyed, and to make a new approach necessary.

A mortgagor in possession is a proper party to the arbitration in such a case, and as owner and occupier and interested in the property is entitled to compensation under the Act; and the municipality having gone to arbitration under the statute with the mortgagor, cannot move to set aside the award on the ground that he has mortgaged the property to persons who have not claimed to be parties to the arbitration.

Regina v. The Municipal Council of Perth, 14 U. C. R. 156, and previous cases distinguished, as decided under the Municipal Act before the 36 Vic. ch. 48, sec. 373, which first gave compensation for lands “injuriously affected.”

THIS was an application to set aside an award made upon an arbitration under 36 Vic. ch. 48, sec. 373, O.

The facts were as follow :

One Yeomans had built a grist mill on a low island in the river Maitland, within six feet of an allowance for road which crossed both the river and island. The road had been gradually raised as the county became settled, and a better road became necessary. Some four years ago, the county built a new bridge over the main branch of the river, under the clauses of the Municipal Act making them liable to build bridges over rivers 100 feet wide in incorporated villages, this bridge being in the village of Mount

Forest. In 1876 the county, in order to put the road in question in repair, raised it about four feet to make it level with the bridges, widened it, and protected it with a railing on both sides. This was done without any by-law, and in performance of what was supposed to be the duty of the county.

There was no evidence that the repairs were unskilfully executed.

The effect of these improvements was to shut up an old road which Yeomans had used up the former embankment, and to compel him and his customers to go round by his saw mill, or deliver at the upper story of the mill direct from the north end of the large bridge.

Yeomans and his wife, she being the patentee of the land, therefore claimed compensation for the damage alleged to have been sustained by reason of the action of the county with reference to the road, and an arbitration was accordingly had under 36 Vic. ch. 48, sec. 373, O., and an award made in their favour on the 4th December, 1877, for \$875. The award also ordered and directed "that the complainants, their heirs and assigns, shall, at all times hereafter, have the right to make and build approaches to and from the said bridge or road, and their said mill-property and dwelling houses and mill-pond, and make all necessary openings in the railing of the said road or bridge therefor, but in so doing not to interfere in any way with the public safety or convenience."

On the 19th February, 1878, *C. Robinson*, Q.C., on behalf of the Corporation of the county, obtained a rule *nisi* from Galt, J., to set aside the award on the grounds: 1. That no injury was shewn or proved to any property of the said Yeomans or his wife, for which they were entitled to compensation, and such alleged injury was caused by work done by the corporation upon and within the limits of the highway, in pursuance of their duties, and with due care and skill. 2. That the award gave damages to said Yeomans and wife for and in respect of the fee simple

unencumbered in the said property, whereas the property was subject to a mortgage, and the claimants were not entitled to receive the sum awarded. 3. The sum awarded was excessive, and unwarranted by the evidence as compensation for any injury for which the claimants were entitled to be compensated. 4. That the arbitrators exceeded their powers in directing that the corporation should be entitled to make and build approaches to and from the bridge or road therein mentioned, and the said property and dwelling house, and mill-pond, and to make all necessary openings in the railing of said road or bridge therefor, but in so doing not in any way to interfere with the public safety or convenience; and the said award was in that respect uncertain and insufficient.

On 31st May, 1878, *S. Richards*, Q. C., and *Cattanach* shewed cause before Gwynne, J. The work done by defendants, although on a highway, is not such a work, by way of repair, as they could ever have been compelled to execute: *Reid v. The Corporation of Hamilton*, 5 C. P. 269; *Croft v. Town Council of Peterborough*, 5 C. P. 35. The Municipal Act of 1866 had not the words "injuriously affected," and they were not in the Act of 12 Vic. They cited further, *Regina v. The Municipal Council of Perth*, 14 U. C. R. 156; *Snook v. Town Council of Brantford*, 14 U. C. R. 255; *Brown v. Municipal Council of Sarnia*, 11 U. C. R. 87; *Ricketts v. Metropolitan R. W. Co.*, L. R. 2 E. & I. App. 175; *Metropolitan Board of Works v. McCarthy*, L. R. 7 E. & I. App. 243; *In re Collins*, 42 U. C. R. 378; *Regina v. St. Luke's*, L. R. 7 Q. B. 148; *Beckett v. Midland Railway*, L. R. 3 C. P. 82.

1st June, 1878, *C. Robinson*, Q. C., contra. The question involved is important, viz., whether the legislation which has taken place since is opposed to the law as laid down in *Regina v. Municipality of Perth*, which has been referred to. See *Lloyd on Compensation*, 4th ed., 101, 2, 4; sec. 410 of 36 Vic. ch. 48. The point that the work done was not done in performance of a duty, was not raised before the arbitrators. If there is anything in that, the case

should be referred back to the arbitrators for decision. The county was bound to keep the highway in repair: *Rowe v. Corporation of Rochester*, 29 U. C. R. 590; *Municipal Manual*, 431, *note*; *Addison on Torts*, 753, 4; *Angell on Watercourses*, secs. 460, 461; 16 Vic. ch. 181, sec. 33; *Con. Stat. U. C. ch. 54*, sec. 323; 29 & 30 Vic. ch. 51, sec. 325; 36 Vic. ch. 48, secs. 373, 374, 376. Then, the award directs payment to persons not having the fee, which is clearly wrong. The arbitrators had no power to award access: *Great Western R. W. Co. v. Hunt*, 12 U. C. R. 124; *Great Western R. W. Co. v. Dougall*, 12 U. C. R. 131; *Great Western R. W. Co. v. Dodds*, 12 U. C. R. 133. Loss of profits is not a subject for compensation, and though the award does not say that anything is given for profits, the evidence tends to shew that this was the case.

12th November, 1878. GWYNNE, J.—The question raised in this case is whether or not the owners of property abutting upon a common public highway are entitled to compensation from a Municipal Corporation under sec. 373 of the Municipal Act of 1873, for injury sustained by reason of the municipality having for the public convenience raised the highway in such a manner as to cut off the ingress and regress to and from their property abutting upon the highway which they had formerly enjoyed, and to cut off in fact all access, except at considerable expense and inconvenience.

In *Croft v. The Town Council of Peterborough*, 5 C. P. 35, an action on the case against the defendants for wrongfully raising the street and sidewalk, on which the plaintiff's dwelling house and shop abutted, several feet higher than it was before, the defendants among other pleas pleaded, as to raising the street, a special justification, that the defendants were a Municipal Corporation and authorized so to do, the street being within their jurisdiction and being below the proper level opposite the plaintiff's house, whereupon it became the defendants' duty to raise it, and they did so. The defendants also pleaded not guilty per statute.

The work was done by the municipality by resolution of the Council and without a by-law, and the questions were 1st—Whether a corporation could set up special matter of defence under the plea of the general issue per statute ; and 2nd, and chiefly, whether the corporation could justify otherwise than under a by-law. McLean, J., before whom the case was tried, nonsuited the plaintiff, being of opinion, an opinion which he retained and expressed in giving judgment upon a rule subsequently made to set aside the nonsuit, that when it was admitted, as it was upon the trial, that the street had been raised by the defendants in discharge of a public duty, a duty which by law they alone were authorized to perform, then, in his judgment, the mode by which they had proceeded became wholly immaterial.

Macaulay, C. J., with whom Richards, J., concurred, in giving his judgment, whereby the nonsuit was set aside and a new trial ordered, said that from what was said and took place at *Nisi Prius*, he was much disposed to think the act complained of would be found to be justifiable without a specific by-law made in due form, but that he did not feel so clear upon the point as to think himself justified in upholding the nonsuit. He says at p. 42: "My present impression is, that if the facts in this case shew that it became the defendants' duty, under the 13 & 14 Vic. ch. 15, to raise the street, they would be justified, but that in the absence of a by-law they must rely upon the powers possessed by them expressly or incidentally, irrespective of the 12 Vic. ch. 81, sec. 60." And again he says: "In the absence of a by-law directing and defining the work, I consider the defendants responsible, in the first place, to the same extent as Commissioners of highways acting under and executing duties and powers assigned to them by statute, according to the decisions in England." And again, at p. 44: "The more immediate question at present is, whether it was within their authority to do what this declaration charges without a by-law to sanction it. Reduced to that point I should think the declaration displayed a sufficient *prima facie* cause of action, but I am not prepared to say whether,

in the absence of a by-law, the facts would sustain an allegation of wrongfulness or not: much may depend upon the state of the street and the nature of the repairs. It is not suggested that it caused a public nuisance, or that it was not a decided improvement of the street and beneficial to the public; and if so, it is manifest that the plaintiff has legal difficulties to contend with in establishing that the work was nevertheless wrongful generally, or wrongful towards him personally as a private nuisance to his property."

The 60 sec. of 12 Vic. ch. 81, under which the defendants justified what they had done, enacted that the municipality should have power and authority to make by-laws for the opening, constructing, making, levelling, raising, lowering, repairing, improving any new or existing highway, road, street, sidewalk, &c., within the jurisdiction of the municipality; and by the 13 & 14 Vic. ch. 15, referred to by the learned Chief Justice, it was enacted that the right to use as public highways all roads, streets and public highways within the limits of any incorporated town, &c., should be vested in the municipal corporation of such town, &c., and such roads, streets and highways should be maintained and kept in proper repair, so long as they should remain open as such, by and at the cost of such corporation; and if such corporation should fail to keep the same in repair, such default should be a misdemeanor punishable by fine, etc., and such corporation should be also civilly responsible for all damages sustained by any person by reason of such default, etc.

In *Reid v. The City of Hamilton*, 5 C. P. 269, to an action on the case for wrongfully, negligently and carelessly digging and excavating a street in the city of Hamilton, adjoining plaintiffs' close, and thereby injuring his close, &c., the defendants pleaded simply not guilty per statute. McLean J., adhered to the opinion which he expressed in *Croft v. The Town of Peterborough*, that the plaintiff had no cause of action, although the work complained of was done under a resolution of the Council only, and without a by-law; but Macaulay, C. J., with whom Richards, J., concurred, was of

opinion that for justification under 12 Vic. ch. 81, sec. 60, a by-law would be necessary, but that for an act within 13 & 14 Vic. ch. 15, the defendants could justify without a by-law, and that a corporation could give the special matter in evidence under a plea of the general issue, per statute; and that the corporation was entitled to notice of action. In these latter portions of the judgment, McLean, J., also concurred. In the course of his judgment the learned Chief Justice discussed the point whether, if there had been a by-law, the facts in evidence presented a case which would have entitled the plaintiff to compensation under 12 Vic. ch. 81, sec. 195, and 16 Vic. ch. 181, sec. 33. By this latter statute and section, which were in substitution for the former, it was enacted "That upon the passing of any by-law by any municipal corporation, erected or to be erected under the authority of this Act, for the purpose of authorizing the opening of any road, street, or other public thoroughfare, or of changing, widening, or diverting any road, street, or public thoroughfare, so as to cause the same or any part thereof to go through or be placed upon or injuriously to affect the land or other real property of any person or persons, it shall and may be lawful for the person or persons who shall own such property to name a arbitrator," &c., &c., and to obtain compensation. The Chief Justice was of opinion that by that section the Legislature did not mean to acknowledge in the proprietors of lands bounded by public highroads, a vested right to have such roads maintained at their existing level, however inconvenient in its use as a public highway, or to grant compensation for such alterations, so long as the original line of road was adhered to, and no encroachment made upon the soil of such adjacent proprietors. His opinion was, that the words used, viz., "changing, widening, diverting" the road, applied only to something done outside of the original limits of a public highway, and not to anything done within its original limits, and that the word "opening" applied to the original opening up of a road to be used as a highway—the creating in fact of a new road; and

although the improvement made within the original limits of a highway might often prejudicially affect individual proprietors, whose lands abut on such roads, and compensation might often be just, and in England seems at times to be provided for, still the learned Chief Justice was of opinion that if in such case compensation was intended to be granted, the intention of the Legislature to that effect should be more explicitly expressed.

Regina v. The Municipality of Perth, 14 U. C. 156, is a decision of the Court of Queen's Bench, precisely to the same effect. Robinson, C. J., pronouncing judgment in that case to the same effect as Macaulay, C. J., in *Reid v. Hamilton*, adds, "We do not think the Legislature meant the clause referred to to be so applied, nor that the words used fairly import it. If they did mean it, and we are in error in our interpretation of the clause, it will be necessary for them to make the intention more plain."

Now, all that these cases decide is, that under the law as it was at the time that judgment in these cases was pronounced an action on the case as for a wrong did not lie against a municipal corporation at the suit of a person injured in his property by an act done within its jurisdiction, and that however much the proprietor of land abutting upon a highway might be prejudiced by the act of the municipality having jurisdiction over the highway in raising or sinking the level of the highway, the law as it then stood provided no compensation for the injured person, however just it might be that he should receive compensation. Neither of these positions affects the case before me, for, without prejudice to their claim for compensation by arbitration, it may be well conceded that the parties injured here, namely, the proprietors of the land abutting upon the highway which has been raised, have no cause of action upon the case, as for a wrong, against the municipality. The question here is, whether or not the changes in the law since these cases were decided, notwithstanding the decisions in those cases, and without infringing or questioning their authority in the slightest particular, do or not

entitle the parties complaining of the injury done to them by the act of the municipality to compensation for such injury.

In 1859 the Municipal Institutions Act, 22 Vic. ch. 54, was passed. By the 321st section of this Act it was enacted that no council should pass a by-law for stopping up, altering, widening, diverting, or selling any original allowance for road, or for establishing, opening, stopping up, altering, widening, diverting, or selling any other public highway, road, street or lane, until, first, written or printed notices of the intended by-law should be published in a manner prescribed in the Act; secondly, and published weekly for a time and in a manner also prescribed; thirdly, nor until the council should hear in person or by counsel any one whose land might be prejudicially affected thereby and who petitioned to be heard.

By the 323rd section it was enacted that "Every council shall make to the owners of real property *entered upon, taken or used by* the corporation in the exercise of its powers in respect to roads and other public communications, or to drains and common sewers, due compensation for any damages necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work, and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act." The 337th section made provision similar to the provisions of 13 & 14 Vic. ch. 15, as to maintaining highways and repair. Now it may be conceded that, as regards alterations made in the level of a highway within its original limits, the language of the above 321st section is not more comprehensive than the language of 16 Vic. ch. 181, sec. 33, and that in the case of like questions arising under this section as did arise in *Reid v. Hamilton* and *The Queen v. Perth*, the judgments in those cases would govern. It is obvious also that the provisions of the 323rd section apply only to the case of the owners of land *taken*, etc., by the corporation for the use of the public.

The Statute 29 & 30 Vic. ch. 51 is identical in its provisions in this respect with 22 Vic. ch. 54, sec. 323 of 29 & 30 Vic. being identical with section 321 of 22 Vic., and section 325 of the former with section 323 of the latter.

So the law stood until the passing of the Municipal Institutions Act of 1873, the 424th section of which corresponds with the 323rd section of 29 & 30 Vic. ch. 51, and the 321st sec. of 22 Vic. ch. 54: but the 373rd of which, and which is in substitution for sec. 325 of 29 & 30 Vic., enacts that "Every Council shall make to the owners or occupiers of or other persons interested in real property, entered upon, taken or used by the corporation in the exercise of any of its powers"—so far this section is a verbatim copy of the corresponding sections in the two former last named Acts; but it proceeds to make this important addition, "*or injuriously affected by the exercise of its powers*;"—"due compensation for any damages necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work, and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act."

Now these words, "*or injuriously affected by the exercise of its powers*," can have no meaning whatever unless they are applied to a different class of persons than those first provided for in the previous part of the sentence, namely, the owners or occupiers of real property *entered upon, taken, or used* by the corporation in the exercise of any of its powers. Thus, as it appears to me, as plain as words can be, the 373rd sec. of the Act of 1873 provides for two distinct classes of persons, namely, the owners or occupiers of real property entered upon, taken, or used by the corporation in the exercise of any of its powers, and the owners or occupiers of real property injuriously affected by the corporation by the exercise of its powers, although not entered upon, taken, or used by the corporation. The sole question therefore which remains is, is the real property of the

claimants in the case before me "*injuriously affected*," within the meaning of the law and of decided cases, by the act of the municipality of the county of Wellington which is complained of. We have many decisions in England, *pari materiâ*, which are to my mind very conclusive.

A person of common understanding, having only an ordinary knowledge of the meaning of the English language, but ignorant of law and of the nicety of some of its distinctions, might well stand amazed if he should hear it doubted whether the property of a person abutting upon a highway, which constituted the proprietor's sole means of ingress and regress to and from his property, was injuriously affected by the highway being raised so high or sunk so low, although within the limits of the highway, as to cut off all access to his property from the highway unless he should expend a large sum of money in making an approach for himself, which approach when made might still, from the steepness of the grade, be very difficult and inconvenient.

The question as to whether in certain given cases property is or is not injuriously affected in the eye of the law has given rise to much discussion. The language of Kelly, C. B., in *Regina v. St. Luke's*, L. R. 7 Q. B. 148, where the act complained of was very similar to that in the case before me, is very appropriate: "It is in vain," he says, "to put forward any of these hypothetical cases, for we are dealing with a case in which it is impossible not to see that the man has sustained an injury of a most serious nature." Again, he says, "I cannot but observe, in a case like this, that whenever it appears that the case is one in which it is plain that very serious injury may have been done to the premises of the party claiming compensation, I think we must put a liberal construction upon the Act of Parliament before us in determining the points raised. Unless it is perfectly clear that the language of the Act is not sufficiently ample or extensive to embrace the case in question, we ought to hold that a party whose property is injuriously affected, and to a very great extent, by the

operations of a public body, shall be entitled in a Court of law to compensation."

But the cases of *Chamberlain v. West End of London R. W. Co.*, 2 B. & S. 605; *Beckett v. Midland R. W. Co.*, L. R. 3 C. P. 82, and *Metropolitan Board of Works v. McCarthy*, L. R. 7 E. & I. App. 243, are conclusive of the claimant's right to compensation in the case before me. It is only necessary to refer to the case in the House of Lords, in which so many of the learned law lords have entered fully into the subject. Lord Chancellor Cairns there adopts the test which has to be applied as to the proper meaning of these words, "injuriously affected," as giving a right to compensation—to consider whether the act done in carrying out the works in question is an act which would have given a right of action if the works had not been authorized by Act of Parliament, although if the question were to be decided now for the first time he seems to have thought the test which he considered established to be somewhat narrow. He then compares the case before the House of Lords to the case of *Beckett v. Midland R. W. Co.*, the act complained of in which was almost identical in its character with the act complained of here, and he comes to the conclusion that beyond all doubt the claimant was entitled to compensation. "It appears to me," he says, "to be a matter entirely indifferent whether you have one highway the further half of which is blocked up and destroyed, or whether you have a double highway, first by land and then by water, and the part of the highway which consists of water is blocked up and destroyed." He then accepts the test submitted by Mr. Thesiger, Q. C., in his argument on behalf of the defendant in error, as one which he thought would explain and reconcile the various cases upon the subject, namely, "that where by the construction of the works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with such property, and which right gives an additional market value to such

property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value."

This test is also adopted by all the other learned law lords who pronounced judgment in the case. Lord Chelmsford quotes with approval Chief Justice Bovill's language in *Beckett v. The Midland Railway*, L. R. 3 C. P., at p. 93, where he says: "If the claimant's right of access from or to the highway was taken away," (the very thing done in the case before me) "nobody would doubt that he would be entitled to compensation. If the entire destruction of the claimant's access by raising or lowering, or diverting the road gives a cause of action, or a right to compensation, I am at a loss to understand upon what principle it can be contended that the obstruction of a substantial part of it does not give the same right. In the one case the premises would be of no value; in the other, their value would be substantially diminished." Lord Hatherley says: "All that we have to take care of is, that we do not extend the rule which has been wisely laid down, with respect to the distinction between cases where you consider that the person injured is being injured as one of the public, and cases where you consider him as a person in a special manner 'injuriously affected.'" "I believe," he adds, "the rule to be a sound one that, wherever an action might have been brought for damages if no Act of Parliament had been passed, the case is brought within the class of cases in which the property is 'injuriously affected.'" He compares then the case before the House of Lords to the case of a man having two accesses to his house, a water access on one side, and a land access on the other, and he adds, "I think there can be no doubt that the taking away of one of those approaches would have been actionable at law, and that if it was done under a Private Act, his property would have been 'injuriously affected,' under the Land Clauses Consolidation Act."

But the judgment of Lord Penzance is of special value, inasmuch as it deals with those points most strenuously urged before me upon behalf of the municipality. He begins by admitting that it would be disastrous to depart from a rule which he treats as established, namely, that whether or not damages can be recovered under the words, "injuriously affected," depends upon whether it might have been the subject of an action if the works which caused the damage had been done without the authority of Parliament. Again he says: "There is another rule which is I conceive well settled in these cases, namely, that the damage or injury which is to be the subject of compensation must not be of a personal character, but must be a damage or injury to the 'land' of the claimant considered independently of any particular trade that the claimant may have carried on upon it."

He proceeds then to apply these rules to the case before him: "It is admitted," he says, "that the jurors have found that the respondent's premises are permanently depreciated in value, independently of any special consideration relating to the trade there carried on, to the extent of £1,900, and this depreciation has been caused by the stopping up and wholly obliterating as a highway of a portion of an approach to the river Thames, which before the works of the appellants were made, flowed within a short distance of the respondent's premises, and constituted a ready access by water between his premises and the great water highway of that river. If respondent's right, as owner of the land, to have access to that highway had been a private right of way, no doubt an action would lie for its disturbance or obstruction, but being a public right, it is said that the only remedy at law is by indictment. This is a well-known rule, but governed and limited by an equally well known exception. It is upon the true meaning of this exception that the present case in my opinion wholly depends." He then refers to the old cases of *Ireson v. Moore*, 1 Ld. Ray. 486, and *Ashby v. White*, Sm. L. C., 4th ed., 186, 212, and he proceeds: "The question then is, whether, when a highway

is obstructed, the owners of those lands which are situated in a sufficient degree of proximity to it to be depreciated in value by the loss of that access along the highway which they previously enjoyed, suffer special damage 'more than' and 'beyond' the rest of the public. It surely cannot be doubted that they do. The immediate contiguity to a highway, commonly called frontage, is a well known and powerful element in the value of all lands in populous districts. Where frontage to a high road does not exist, propinquity and easy access to a high road are equally undoubted elements of value in such districts, distinguishing lands which have them from those which have them not. If then the lands of any owner have a special value by reason of their proximity to any particular highway, surely that owner will suffer special damage in respect of those lands, *beyond* that suffered by the general public, if the benefits of that proximity are withdrawn by the highway being obstructed, and if so the owner of such lands appears to me to fall within the rule under which an action is maintainable, though the right interfered with is a public one. It was asked in argument where are the claims to compensation to stop if the rule be so applied. The answer, I think, is, in each case the right to compensation will accrue whenever it can be established to the satisfaction of a jury or arbitrator that a special value attached to the premises in question by reason of their proximity to, or relative position with the highway obstructed, and that this special value has been permanently destroyed *or abridged* by the obstruction."

Lord O'Hagan says: "It is established law, in a case to which I think reference has already been made—*Ashby v. White*—that if a person has sustained a particular damage beyond that of his fellow citizens, he may maintain an action in respect of that particular damage. Now, here the plaintiff seems to me to have been clearly subjected to such a damage. He has a property which is so situated that the act, which may have been necessary or important for the public interest, has damaged it to a

large extent, has damaged it permanently, and in such a way as to make it far less valuable by any change in the mode of using it. Is not this damage particular, and not such as the fellow citizens of the claimant generally experience? How is he to be indemnified for his special loss by the infinitesimal advantage which may accrue equally to them and to each of them? It seems to me unreasonable and unjust that he should be made involuntarily to suffer for the public benefit, or that he should not be recompensed for the real and peculiar loss he has undoubtedly sustained. For such a loss I think he might have recovered in an action before the Statute; and I believe that if the Statute has not enlarged, it has not diminished his right to a like recovery in another way."

The language of these judgments, in the minutest particular, appears to me to apply to the facts of the case before me, as if these were the identical facts of the case then in judgment before the House of Lords.

Mr. Robinson, Q. C., on behalf of the municipality, desired to apply the test accepted in that judgment by putting the case of a private person owning property adjoining the property of the claimants here, who had raised an embankment or a wall upon his property adjoining the line between it and the property of the claimants; in which case, he contended that the claimants here would have had no cause of action, and that therefore under the rule established there would be no right of compensation. But the case so put is wanting in the essential element which is necessary to make it analogous to the present; for in the case put the claimants would be deprived of no right of way or access to their property which they had previously enjoyed. No such right is supposed to be infringed or abridged. If in the case put the claimants were stated to have been in the position of having had a private right of way to their property over the land of the adjoining owner upon which the embankment or wall is supposed to be erected, thereby cutting off the right of way before enjoyed, the answer is, as put by Lord Penzance in

the above case, that the party whose private right of way was so infringed would have an undoubted cause of action, which might be enforced even to the extent of abatement of the private nuisance.

The question involved in the rule is, *could the particular act complained of*, which here is the obstructing the claimants' ingress and regress between their property and the highway, by which they had communication with the outer world, have been committed without giving to the owner of property so injured a cause of action, unless the act complained of were authorized by an Act of Parliament?

In the case before me the Act of Parliament under which alone the work complained of can be justified, at the same time that it authorizes the county municipality to construct the work, declares that every council shall make to the owners or occupiers of, or other persons interested in, property injuriously affected by the exercise of its powers, compensation for any damages necessarily resulting from the exercise of such powers, and that every claim for such compensation, if not mutually agreed upon, shall be determined by arbitration. That the claimants' property has been injuriously affected within the meaning of the established rule cannot in my opinion be doubted, nor can it be doubted that the injury is of a very material character, the *minimum* measure of damage resulting from which cannot, as it appears to me, be less than the cost of giving to the claimants such convenient access to their property by the raised highway as *shall* be a reasonably fair equivalent for that approach of which they have been deprived.

The arbitrators to whom the matter has been referred under the provisions of the Statute have estimated the claimants damages at \$875.00, and they consider that the complainants should have the right at their own cost to construct all necessary approaches from the raised highway to their property and to maintain them at their own expense. It has been urged that the above amount is excessive, and that some of it must be attributed to being compensation for loss of trade profits, which it is contended are not the

proper subject of compensation, and should not have been taken into consideration. But conceding that the rule is, however harsh it may in some cases prove to be, that no damage arising from the particular purpose to which the land is applied should be taken into consideration, but only the diminished value of the land itself, still I see nothing from which it can be reasonably inferred that the arbitrators have included in the above sum anything by way of compensation for the loss of the claimants' profits arising from their business as millers carried on upon the premises. The amount awarded is little more than the county inspector, Mr. Taylor, in his evidence says that it would cost to make "a good approach suitable for the Yeomans' use, and to properly protect the road," which he estimates at \$750.00. Of the three or four modes suggested by Mr. Taylor as to how in his opinion the claimants could have access to the road, I think it was competent for the arbitrators to adopt that which Mr. Taylor spoke of as "a good approach suitable for the claimants' use," and I see no reason for concluding that this may not have been the measure of damages adopted by the arbitrators, although they may have thought the estimate low. The amount in excess of the cost of constructing a good and suitable approach may have been given, either upon the ground that the arbitrators may have thought Mr. Taylor's estimate too low, or perhaps it may fairly be attributed to compensation for injury sustained by the claimants having been, up to the time of the award being made, deprived of that access to their premises which they before had.

It is also objected that the award is bad, and should be set aside as uncertain, in awarding that the claimants shall have the right to make and build, at their own cost, approaches to and from their premises and the raised highway.

The arbitrators seem to have thought that for the enjoyment of the property it is absolutely necessary that the approaches should be made, and that this may be so can readily be understood when we consider the manner in

which the lots are laid out in this country, no lots except corner lots having any approach to them, or means of ingress or regress except by one road extending along the front of the lot. It is not improbable that the road in question is the only means of access which the claimants have to their lot, and the arbitrators having awarded to the claimants a sum of money sufficient to pay for the construction of a good and sufficient approach by way of the raised highway, it is but reasonable that the claimants should be obliged to construct the necessary approach themselves. All that the arbitrators direct is, that the claimants shall have the right to construct the approach which the arbitrators think it is necessary they should have, subject however to this qualification or condition, namely, that in making such approaches they shall not in any way interfere with the public safety or convenience.

The claimants would have or they would not have the right of making the approaches from their property to the highway independently of the direction in the award. If they would have it, the inserting the direction that they shall have the right which independently of the direction they would have, should not avoid the award. If they would not have the right without the direction in the award, then it appears to me that from the nature of the case it was competent for the arbitrators to give that direction which would prevent the Act of the complainants, in constructing those approaches which the arbitrators conceive to be essential to the enjoyment of their property by them, being treated as a wrongful act, to prevent which the municipality might take legal proceedings. As to uncertainty as to the place where the approach may be made, that does not appear to me to be objectionable, because the proprietor of property abutting on a highway has a right, as it appears to me, to make one or more ways of ingress and regress between his property and the highway. His right of access is upon and over every part of the highway, and restricting him in the performance of the work so as not to interfere with the public safety or convenience,

seems to provide for every thing that was necessary to be provided for in the interest of the public. The case does not appear to me to come within the principle of the decisions in *Great Western Railway Co. v. Hunt*, and *Great Western Railway Co. v. Dougall*, 18 U. C. 124, 131.

As to the objection that a mortgagee of the property is not a party to the arbitration, I understood that any objection upon that ground had been or would be removed by obtaining the consent of the mortgagee. It appears to me, however, I confess, in the absence of authority, for I have been referred to none upon that point, that I should not set aside the award upon that ground. A mortgagor in possession may, I think, well be entitled to be a party and a sufficient party to the arbitration; and as owner and occupier and interested in the property, in the words of the Act, to receive the compensation. If the mortgagee claims the compensation, or if the county entertain any apprehension that payment to the mortgagors will not discharge them, they may possibly raise the point by an application to pay the money into Court, if that can be done, as to which I express no opinion; but having gone to arbitration under the Statute with the claimants, as owners and occupiers of and interested in the property, I do not think they can move to set aside the award upon the ground that the claimants, although occupiers of and interested in the property, have as owners mortgaged the property to other persons who have not claimed to be parties to the arbitration.

The rule, I think, must be discharged, with costs.

Rule discharged, with costs.

MICHAELMAS TERM, 42 VICTORIA, 1878.

From November 18th to December 7th.

In Trinity Vacation, on the 13th day of November, 1878, the Honourable JOHN HAWKINS HAGARTY, Chief Justice of the Court of Common Pleas, was appointed Chief Justice of this Court, in the place of the Honourable ROBERT ALEXANDER HARRISON, deceased.

In Trinity Vacation, on the 15th day of November, 1878, the Honourable MATTHEW CROOKS CAMERON, one of Her Majesty's Counsel learned in the law, was appointed one of the Puisne Judges of this Court, in place of the Honourable Mr. Justice WILSON, appointed Chief Justice of the Court of Common Pleas.

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN DOUGLAS ARMOUR, J.

“ “ MATTHEW CROOKS CAMERON, J. (a).

BENNETT ET UX. V. CORPORATION OF COUNTY OF YORK.

Highway—Kingston road—Liability of County for repair—Con. Stat., C., ch. 28, Schedule A.

Con. Stat., C., ch. 28, Schedule A, declares that the Kingston Road east of the river Don, shall not be held to be within the city of Toronto or liberties thereof, but shall remain under the control of the Commissioner of Public Works, or of any party to whom it may be transferred by order of the Governor in Council. The defendants purchased this road from the Government, and with their permission, express or implied, the city put down a sidewalk upon it.

Held, that defendants were liable for the state of the road and sidewalk, and a verdict having been rendered in favour of the plaintiffs in consequence of an injury sustained by the female plaintiff in falling on the sidewalk, which was out of repair, the Court refused to interfere.

(a) Mr. Justice CAMERON was not sworn in until the 27th day of November, 1878, on which day he took his seat.

THIS was an action brought by the plaintiffs against the defendants, for an injury sustained by the female plaintiff in falling on a sidewalk alleged to have been out of repair.

There were two counts in the declaration, the first alleging that defendants were possessed of a certain road or highway in the County of York, called the Kingston road, on the south side of which was a boarded footway, which defendants ought to have maintained and kept in good repair, so as to prevent damage to any person using the same, and employing ordinary caution in the use thereof; yet that defendants, wrongfully and contrary to their duty, so negligently kept the same and allowed the same to get into disrepair, and the planks to become loose, as to be dangerous to persons passing along the same, by means whereof the said female plaintiff, wife of the said George Alfred Bennett, whilst using the same, by reason of the tilting up of one of the said planks, was knocked violently to the ground, and was thereby injured, and suffered great pain and bodily suffering.

The second count was for damage to the husband in the loss of the comfort, benefit, and assistance of his said wife, and money disbursed in and about the nursing, &c., of his said wife.

Pleas: not guilty, not possessed, and non-accrual of cause of action within three months.

Issue.

The cause was tried at the Toronto Assizes in June last, before Galt, J., and a jury.

It appeared that many years previously the city, with the permission, express or implied, of the county, had put down the sidewalk in question on the Kingston road. It also appeared that the city, east of the Don bridge, extended along the southern line of the Kingston road, and that the sidewalk was doubtless put down chiefly for the accommodation of the city ratepayers and inhabitants, but was equally used by the inhabitants of the county at their pleasure. The female plaintiff was passing along on the sidewalk, when some one coming along stepped on a loose

plank, causing it to tilt up and strike her, and producing the injuries complained of.

It was objected that the defendants were not liable, as the sidewalk was built by the city, and under their charge.

Leave was reserved to move to enter a nonsuit on this ground.

It was also urged that the wife had been guilty of contributory negligence, as it appeared that she had been for some time aware of the defective state of the sidewalk, having in fact tripped on it before, as had also a child of hers; and that defendants had no notice of the defects in the sidewalk complained of.

The jury found in favour of the plaintiffs, \$75 for the wife, and \$50 for the husband.

J. K. Kerr, Q. C., 29th August, 1878, obtained from Galt, J., a rule *nisi* accordingly on these points.

Donovan, 27th November, 1878, shewed cause. The defendants are clearly liable. The road belonged to them, and not to the city. There was no contributory negligence on the part of the wife. He cited *Adair v. Corporation of Kingston*, 27 C. P. 120.

Kerr, Q. C., contra. The learned Judge should have nonsuited the plaintiffs, as the evidence shewed the sidewalk had been out of repair for some time, and the female plaintiff knew it: *Hutton v. Corporation of Windsor*, 34 U. C. R. 487; *Castor v. Corporation of Uxbridge*, 39 U. C. R. 126, 127; *Boyle v. Corporation of Dundas*, 25 C. P. 434, 435; *Ray v. Corporation of Petrolia*, 24 C. P. 73. On the evidence, the highway and sidewalk were not the defendants': *Harrold v. Corporation of Simcoe and Ontario*, 18 C. P. 9; *Hacking v. Corporation of Perth*, 35 U. C. R. 460. The contention is, that the defendants took the road after the city had acquired the right to make the sidewalk, and therefore took subject to the city's duty to maintain the sidewalk. Then, there is no evidence of notice to the defendants of the defect: *Shearman & Redfield* on Negligence, 2nd ed., sec. 407; *McCarthy v. Corporation of Oshawa*, 19 U. C. R. 245.

December 7th, 1878. HAGARTY, C. J.—On the general merits we see no sufficient ground for our interference.

As to the alleged negligence, and contributory negligence, and notice to defendants as to the state of the sidewalk, it all rested on plaintiffs' evidence, as the defendants called no witnesses.

We do not think the learned Judge could have withdrawn the case from the jury, and he left it to them in a manner of which the defendants, we think, cannot justly complain.

We cannot interfere on the merits on this evidence. It went fairly to the jury, who found for the plaintiffs, with very moderate damages; and we cannot say that in law the verdict is unsupported by credible testimony.

The defects in the sidewalk had been long in existence, and well known, and defendants (if responsible) must be held to have reasonable notice on this evidence.

Had the jury found for defendants, we should probably not have felt warranted in interfering.

As to the question of liability, the Kingston road, on the side of which the sidewalk has been put, is, we think, clearly without the city limits, and within the jurisdiction of the county.

The original charter of the city so fixes the limits: 4 Wm. IV. ch. 23.

Consol. Stat., C., ch. 28, schedule A (p. 334), declares that the Kingston road, east of the river Don, shall not be held to be within the city of Toronto or liberties thereof, but shall remain under the control of the Commissioner of Public Works, or of any party to whom it might be transferred by order of the Governor in Council.

The defendants, it was found, purchased this road from the Government, and the county clerk proved the county had an inspector to look after this road, but not the sidewalk. It seemed they left it to the city to do as the latter pleased with it.

We think the defendants are clearly liable for the state of the road and sidewalk which they have permitted, if

not to have been put there originally, certainly to remain for years.

We are not now enquiring whether the city could be made responsible, but we certainly think that there can be no doubt of the liability of the county as the owners of the whole road.

On the general question, we may refer to *Corporation of Vespra v. Cook*, 26 C. P. 182 ; *Rounds v. Corporation of Stratford*, same vol. p. 11.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

REGINA V. BANNERMAN.

Criminal law—Forgery—32-33 Vic. ch. 19, sec. 54, D.—Corroborative evidence.

On an indictment for forgery of the prosecutor's name as endorser of a promissory note, the prosecutor swore that he had not endorsed the note; that it was not his writing; that he had never authorized the prisoner to sign his name to the note, and that he was himself unable to write his name, being in fact a marksman; and a son of his also swore that his father was unable to write his name, and was a marksman. The prosecutor also swore that on other occasions he had endorsed for the prisoner, making his mark, and had sometimes authorized the prisoner to write his name:

Held, CAMERON, J., dissenting, that a sufficient *prima facie* case was thus made out; that the prosecutor's evidence was duly corroborated within the meaning of 32-33 Vic. ch. 19, sec. 54, D., and that the onus was then on the prisoner to shew that he was authorized to use or write the prosecutor's name.

Per CAMERON, J., that the part of the prosecutor's evidence which required to be corroborated was not that he could not write, but that on this occasion he was not authorized, and on this point there was no corroboration.

THIS was a case reserved for the opinion of this Court, by Burton, J. A.

The prisoner was tried and convicted at the last Assizes at St. Thomas, upon an indictment charging him with forging the name of the prosecutor Peter Ferguson, as endorser of a promissory note, and also charging him with uttering the same note with the forged endorsement "Peter Ferguson," thereon, well knowing the same to be forged.

The note in respect of which this forging and uttering were charged, was a note dated the 1st day of December, A.D. 1877, made by the prisoner, payable six months after the date thereof to the order of Peter Ferguson, at the Molsons' Bank, in St. Thomas, for the sum of \$513.74, and endorsed "Peter Ferguson."

Evidence was given that the signature of the maker of this note was in the handwriting of the prisoner, and that the prisoner had given this note to Fish, Sheppard & Co., of Montreal, as security for the payment of goods sold by them to him.

The prosecutor, Peter Ferguson, whose name was endorsed on the note, was called as a witness, and proved that he could not write, that he never did write, and that the only way he could signify his assent to any document was, by making his mark; and on being shewn the note, and being asked if he wrote the name Peter Ferguson, on the back thereof, said he never did. He also gave evidence to the effect that he never authorized any one to endorse his name on the note. Duncan Ferguson, a son of the prosecutor, also proved that his father, Peter Ferguson, did not write, and one Day also proved that he knew the prosecutor, Peter Ferguson, that he had known him between three and four years, and that he knew he could not write.

Objection having been taken at the trial by the prisoner's counsel that the evidence of Peter Ferguson, a person interested, was not corroborated by the other evidence given at the trial, so as to support the conviction under the statute 32-33 Vic. ch. 19, sec. 54, D., the learned Judge reserved the question for the opinion of this Court.

December 3, 1878. *McDougall* appeared for the prisoner, and contended that the corroborative evidence was insufficient to sustain that of the principal witness. He referred to *Regina v. Giles*, 6 C. P. 84; *Orr v. Orr*, 21 Grant 397, and per Draper, C. J., 409, 410; *Regina v. Yates*, Car. & Marsh. 132; *Regina v. Macdonald*, 31 U. C. R. 337.

J. G. Scott, Q. C., contra, contended that there was no need for further corroboration, citing *Regina v. Gardiner*, 8 C. & P. 737; *Regina v. Rogers*, 2 C. & K. 607; *Regina v. Birkett*, 8 C. & P. 732.

28th December, 1878. ARMOUR, J.—The Act 32-33 Vic. ch. 19, sec. 54, provides that "In all prosecutions by indictment or information against any person or persons for any offence punishable under this Act, no person shall be deemed an incompetent witness in support of the prosecution by reason of any interest which such person may have or be

supposed to have in respect of any deed, writing, instrument or other matter given in evidence on the trial of such indictment or information, but the evidence of any person or persons so interested, or supposed to be interested, shall in no case be deemed sufficient to sustain a conviction for any of the said offences, unless the same is corroborated by other legal evidence in support of such prosecution."

The corroboration required by this section is not the corroboration of the evidence of the person interested in every material particular, but the corroboration of it in some material particular tending to support the prosecution.

In *Regina v. Giles*, 6 C. P. 84, where no evidence was given of the forgery but that of the person interested, and the same question was reserved as in this case, Draper, C. J., says, in referring to the evidence of such person: "But there is no corroboration of his testimony, *i.e.*, there is no one material fact proved by him which is proved either by other direct testimony, or by the proof of other facts which go to establish the truth of any material part of his statements."

I am of opinion that the evidence of Duncan Ferguson and of Day, to the effect that the prosecutor was unable to write his name, was "other legal evidence in support of the prosecution" within the meaning of the section referred to, and that it sufficiently corroborated the evidence of the prosecutor to sustain the conviction, and that the conviction must therefore be affirmed. See *Bessela v. Stern*, L. R. 2 C. P. Div. 265; *Cole v. Manning*, L. R. 2 Q. B. Div. 611.

HAGARTY, C. J.—The prisoner uttered a note purporting to be endorsed "Peter Ferguson." This Peter Ferguson swore that he had never endorsed such a note: that it was not his writing: that he had never authorized the prisoner to put his name there; and finally, that he was wholly unable to write his name, and was a marksman. A son of his then swore that his father was unable to write his name, and was a marksman.

I am of opinion that a sufficient *primâ facie* case was thus made for the Crown, and that the evidence of Peter Ferguson was duly corroborated within the meaning of the statute.

I think the burden was then on prisoner to shew, as a defence, that he was authorized to use or write Ferguson's name. Our statute contains this clause as to corroboration. It is not in English legislation.

I cannot believe that our Legislature, by the language used, meant corroboration by independent testimony as to every material fact. We must regard the object of the statute, to get rid of the objection of the prosecutor being an interested witness, and that the required corroboration would naturally be as to the forged name or written matter. Under the old law, without a release, Ferguson would have been inadmissible. The *primâ facie* case could only have been made by shewing, as here, that the name Peter Ferguson was not and could not have been written by him, as he could not write. I think that would have been sufficient for the Crown to prove. Without calling Ferguson it would be next to impossible to prove negatively that he had not given any authority for another to use his name. I think from the very nature and necessity of the thing it must be for the prisoner to shew affirmatively that he had such authority.

The words in section 54 (Act of 1869) are, "but the evidence of any person so interested, or supposed to be interested, shall in no case be deemed sufficient to sustain a conviction, * * unless the same is corroborated by other legal evidence in support of such prosecution."

I do not read this as requiring independent proof in every material fact.

If this be insisted on, I do not see the use of admitting the interested witness at all.

In some statutes requiring corroboration the words are, "corroborated in some material particular," as the Bastard's Act. On this the case of *Cole v. Manning*, L. R. 2 Q. B. Div. 611, is very instructive. It was insisted that the cor-

roboration must be as to the fact of the improper intercourse. The Court held that general evidence of acts of familiarity, the existence of peculiar opportunity, &c., &c., might be used to prove the charge of paternity. *Regina v. Percy*, 17 Q. B. 902, in note, may be cited.

The Statute 32 and 33 Vic. ch. 68, sec. 2, declares that no plaintiff in an action for breach of promise of marriage, shall recover a verdict unless his or her testimony be corroborated by some other material evidence in support of such promise.

The judgment of the Court of Appeal, in *Bessela v. Stern*, L. R. 2 C. P. Div. 265, reversing the decision of the Common Pleas, shews clearly the kind of corroboration which, under these words, may be held sufficient.

In our statute the words are wider, and merely require the evidence of the interested prosecutor to be "corroborated by other legal evidence."

I am of opinion the evidence in this case, if believed, was legally sufficient to support the conviction.

CAMERON, J.—By section 54, ch. 19, 32-33 Victoria, it is provided, "In all prosecutions by indictment or information against any person or persons for any offence punishable under this Act, no person shall be deemed an incompetent witness in support of the prosecution by reason of any interest which such person may have, or be supposed to have, in respect of any deed, writing, instrument or other matter given in evidence on the trial of such indictment; but the evidence of any person or persons so interested, or supposed to be interested, shall in no case be deemed sufficient to sustain a conviction for any of the said offences, unless the same is corroborated by other legal evidence in support of such prosecution."

Upon the trial of the prisoner for the alleged forgery of the name of Peter Ferguson, as endorser of a promissory note for \$513,74 made by the prisoner, payable to the said Peter Ferguson, or order, the prosecutor was called as a witness in support of the prosecution, and gave evidence

to the following effect: "I have in my hand a note made by S. M. Bannerman for \$513.74, payable six months after date, dated the 1st day of November, and with the name Peter Ferguson on the back of it." In answer to the question, "Did you write that Peter Ferguson?" he said: "I never did. The prisoner charged me with writing that name."

In cross-examination he stated: "Bannerman has been carrying on business in Springfield for years. I was middling well acquainted with him. We used to visit at each other's houses sometimes. We were on friendly terms. I have endorsed for him at various times. I did not sign my name then. I put my mark. I think I authorized him four times to write my name. That commenced two years ago last September. I think it ran on for three months. He paid the first note, and in a little while he came again and did the same thing. The next time, I think, was in August. I am not very certain. I could not remember when the fourth time was. It was renewals. He was never paying up. I think these were the only endorsements I ever made. I might have endorsed more. It was at the Exchange and at Molson's Bank, St. Thomas. I think there was only the four times that I endorsed. My memory may cheat me, though. I never authorized him to use my name in any other way. I knew Nichol of Springfield. I gave an order to Bannerman then. I authorized my name to be put there on that occasion. I had forgotten that. I used to be at the prisoner's store frequently. I traded some in his store." To the question, "Whenever you made these endorsements, or added your mark to these notes, it was always when you and Bannerman were alone, was it not?" He answered, "Yes; I thought at the time Bannerman would not wrong me. I would not have authorized him to endorse notes for me if I had had the least expectation that I would have to pay them."

Duncan Ferguson and James Day gave evidence that Peter Ferguson could not write; and the question for the

decision of the Court reserved at the trial is, was this legal evidence in support of the prosecution corroborative of the evidence of Peter Ferguson, within the meaning of the above section of ch. 19, 32-33 Vic.? I am of opinion it is not. It is not alleged or pretended on the part of the prosecution that the prisoner attempted to imitate the writing of the prosecutor, because he could not write, and could not therefore be imitated; and if he endorsed at all, some one had to write his name; but it is alleged that, without authority, the prisoner wrote the name of the prosecutor on the back of the note: that although he had endorsed on several occasions when the prisoner wrote his name for him and he put his mark, and might have done so on others, and on one occasion had authorized him to sign his name for him when he was not present at the signing, he did not authorize it to be done on the present occasion.

Now, to my mind, in this case the part of the evidence of the prosecutor that requires to be corroborated in support of the prosecution is not that he could not write, but that the writing his name on the back of this note was not on an authorized occasion. The prosecutor says that when he made the endorsements to the notes, or put his mark there, he and the prisoner were alone. Now, assume that the prosecutor chose to say, shortly after having authorized the prisoner to sign his name to a note, that he had not authorized him, in what a perilous position the prisoner would have been placed, the authority having been given when they were alone, if all that the prosecutor was required to do in support of his statement, to sustain a charge of forgery, was to shew that he could not write. Or, to make the position plainer, assume that the prosecutor said, on fifty different occasions I authorized the prisoner to write my name, but on this particular occasion I did not; could it be said that proof he could not write would be evidence in corroboration of his evidence in support of the prosecution? The statute does not say that what is required in corroboration is evidence of the want of genuineness of the signature, but corroboration of the evidence

of the person interested or supposed to be interested in the instrument alleged to have been forged, meaning, of course, the material evidence of such person, and what is material must depend upon the circumstances of each case. Where the prosecutor can write, evidence that the signature alleged to have been forged is not his handwriting would be corroborative of his evidence in denial, because no presumption of authority to another to write his name could exist; but in this case, even of a person able to write, if in his evidence he said I authorized the prisoner to write my name for me on many notes, but I did not on this particular one, it would not be evidence, in corroboration of his evidence in support of the prosecution for forgery, to prove the handwriting did not resemble his.

In the one case evidence that the writing did not resemble the prosecutor's would be material, in the other it would not, because the guilt or innocence would in no manner depend upon the genuineness of the signature, that is, as being the actual handwriting of the prisoner. I know it may be urged with very great force that this consideration is one entirely for the jury, and they are to determine, on all the facts before them, whether the signature is authorized or not. That would have been so without this statute; but it provides in positive terms that in no case shall the evidence of the person interested, or supposed to be interested, be deemed sufficient to sustain a conviction for forgery, unless the same is corroborated by other legal evidence in support of the prosecution. It is for the Court to say whether the evidence is sufficient to go to the jury in corroboration of the evidence of the prosecutor, and upon the best consideration I have been able to give the case I am of opinion that there was no evidence given on this trial corroborative of the evidence of the prosecutor on the point requiring corroboration, and therefore the conviction of the prisoner was wrong and should be reversed.

It was not contended that the evidence of Peter Ferguson did not require corroboration, but if it had been *Regina v. Giles*, 6 C. P. 84, is a clear authority against such contention.

It may be a very difficult matter to prove a negative, and it may be said the affirmative, that the prisoner had authority, rests with him to make out. If no one were present when the authority was given, it would be impossible for the prisoner to prove it, and thus the difficulty of direct proof may be as great in one case as the other, and sometimes it is essential to give evidence to establish a negative: see *Williams v. The East India Co.*, 3 East 192, and cases there cited. The presumption of innocence is on the prisoner's side, and to displace this there should have been some evidence on the only point really in question, the want of anything corroborative of the prosecutor.

The Bastardy case of *Cole v. Manning*, L. R. 2 Q. B. Div. 611, is not an authority against the prisoner in this case. The language of the statute there was, "If the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said Justices, they may adjudge the man to be the putative father of such bastard child," and it was held that previous intimacy between the mother of the child and the defendant was evidence corroborating the mother's on a material point. Here the statute prohibits in positive terms the conviction of the prisoner unless the evidence, and not merely some material particular, shall be corroborated, and, as I have already said, the material point here requiring corroboration is that the name of the prosecutor to the note was not written by the defendant on an authorized occasion, it being admitted he had authority on at least one occasion to sign his name when the prosecutor did not make his mark, and on several occasions when the prosecutor said he made his mark.

Conviction affirmed.

MARRIN ET AL. V. STADACONA INSURANCE COMPANY.

Insurance—Loss, if any, payable to a third party—Cancellation—Right of insured to recover.

The plaintiffs effected an insurance with defendants, "loss, if any, payable to H.," as security for goods supplied by H. to them. The policy was held by H. and was handed over, it appeared, by some mistake of the latter's clerk, among a number of other policies effected by H., to defendants for surrender or cancellation: *Held*, that plaintiffs were entitled to recover, and that it was not necessary to bring the action in the name of H., whose interest, if any, was wholly contingent on the state of his account with the plaintiffs when the right of action accrued.

Held, also, that in the case of a policy such as this, the payee cannot deal with it as his own, and agree to its cancellation. He may surrender his claim under it, but the owner of the property who is named as the insured, if he retain his interest in the property, is entitled to the insurance to the extent of such interest.

ACTION on a fire policy for \$5,000, dated 24th April, 1876, for one year, and renewable, on a stock of goods in Barrie, averring loss to full amount insured.

Pleas: *Non est factum*.

2. That before loss the policy was delivered up by plaintiffs to the defendants to be cancelled, and the risk was terminated, &c.

3. On equitable grounds, that the policy was issued to Messrs. Hughes upon the terms that the loss, if any, should be payable to them as being interested in the goods insured, and they became entitled to the benefit of said policy: that before the loss it was agreed with Hughes that the policy should be returned to defendants and cancelled, and the risk terminated; and that defendants should deliver to the policy holders an undertaking to make a return to them of unearned premiums after a settlement of certain existing losses, and Hughes accepted their proposal, and they delivered to them their undertaking to pay \$61, the premium for the unexpired term, and applied to them for the policy to be cancelled, and Hughes handed the same to defendants for that purpose, and the policy was cancelled and the liability put an end to.

Issue.

The trial took place at Toronto, before Galt, J., without a jury.

By the terms of the policy, the loss, if any, was made payable to Messrs. Hughes Bros., of Toronto. There was a further insurance in the Western Insurance Company for \$5,000.

The plaintiffs had been dealing with the Messrs. Hughes for some years, and owed them about \$8,000 for goods supplied on credit.

Hughes was a shareholder in defendants' company, and introduced the plaintiff, P. Marrin, to them, going with him to the office. Plaintiff signed the application, and it was arranged the loss, if any, should be paid to Hughes. Hughes had urged him to insure his goods. The fire occurred on the 22nd of September, 1877.

Plaintiff swore that he sent the money to pay the premium, and also to renew at the end of the year: that he never knew or heard, up to the time of the fire, of any alleged cancelling of the policy; and that he had never authorized Hughes to deal with the policy.

The first receipt of premium, April, 1876, was to Marrin Bros., and again on the 1st of May, 1877, there was a receipt for the renewal premium from plaintiffs.

The great fire at St. Johns, N. B., was in June, 1877. The defendants' company sustained very extensive losses and temporarily suspended business. Public notice thereof was given, and that the company would, on presentation of policies, give a certificate of the amount of unearned premiums thereon.

Messrs. Hughes had a good many policies, (some nine or ten), in defendants' company, and when the suspension was known, they proceeded to re-insure with other companies. None of these policies were in the position of plaintiffs, except one of a man named Johnston, which was held over till he was communicated with. They made no re-insurance on plaintiffs' policy.

On the 30th of June Messrs Hughes sent a letter to plaintiffs to the effect that defendants' company had sus-

pended, and it would be necessary for plaintiffs to re-insure, and asked whether they would re-insure in Barrie or in Toronto.

Plaintiffs said they never received this letter. At all events it was never answered, and no re-insurance was effected.

It appeared that Messrs. Hughes were indebted to defendants for calls on stock, and the latter had been for some time pressing for payment. At last the parties came to some understanding that the defendants would allow Hughes the amount of the unearned premiums on his policies that were to be cancelled, and they should pay the balance in cash.

A number of certificates were made out, (ten), dated the 3rd of July, 1877. One read thus: "In consideration of the cancelment and surrender to the Stadacona Fire and Life Insurance Company of Quebec, of its fire policy, No. 9514, issued to Messrs. Marrin Brothers, Barrie, the said company hereby undertakes to pay to them the sum of \$61, being amount of unearned premiums due under the terms of the said policy."

The gross amount of the certificates was \$211.60. The calls were \$304.75, and the cheque of Messrs. Hughes for the difference, \$93.15, was given to defendants on September 20th, 1877, only two days before the fire.

Mr. Hughes swore very positively that he had no intention whatever to cancel or surrender plaintiffs' policy: that he had no authority so to do: that he referred the matter to the plaintiffs: that he claimed no lien on or interest in the goods sold to plaintiffs: that he signed the cheque for the balance above mentioned, drawn and filled by his clerk, and that he had no idea that he had been credited with the unearned premium thereon, and immediately on learning it he sent the money to defendants, who declined to receive it.

One Convey, a clerk of Hughes, fully confirmed this view, stating that it was his mistake: that after the St. John's fire he went over the policies with his employer,

Hughes, who told him to put the plaintiffs' policy aside, and that he was writing to plaintiff about it: that he had all the policies in a band in his drawer, and when Reed, defendants' agent, who was attending to the cancelling of the policies, came about it, that he handed him all the policies, including plaintiffs': that on the morning after the fire, when Hughes discovered this, he severely blamed him for what he had done: that he was aware, when he gave the policies to Reed, that the plaintiffs' was amongst them, but he said he considered them all equally worthless.

Archibald, Hughes' book-keeper, stated that he took the amount of unearned premiums from Reed, and drew a cheque for the balance, which he took to Hughes, who signed it at his request, witness saying it was a cheque for the balance above the unearned premium: that he (witness) did not know that plaintiffs' policy had been included in the statement.

After the fire plaintiffs called a meeting of their creditors.

A Mr. Eby, called by defendants, said he was at the meeting: that he thought plaintiff admitted having received the letter already noticed from Hughes about re-insuring, but had overlooked it, and he stated that he understood the policy was spoken of as cancelled and of no value, and was treated as such by the creditors, who agreed to a composition of so much in the dollar.

Hughes and plaintiff both denied this account of the meeting, and said that the difficulty spoken of at the meeting about the policy referred to the defendants' financial difficulties, and that plaintiffs insisted they had never cancelled.

At the time of the fire, Hughes' claim against the plaintiffs was reduced from \$8,000 to about \$5,000, and there was a policy in the Western, of which \$3,000 was to go to Hughes.

The defendants' witnesses varied the account of the various arrangements in some detail, but the substance of the evidence was as already stated.

As one of these witnesses said, they did not know that the plaintiffs knew anything about the matter, "except that we inferred that they did know about it, and that their agent was acting under their instructions."

The learned Judge found that the policy was effected by the plaintiffs for their own benefit: that the memorandum in the policy was made as a security to Messrs. Hughes for payment of any balance of account that might be due to them: that Messrs. Hughes had no authority, as agents for the plaintiffs, to surrender the policy: that the plaintiffs never did surrender the policy: that the policy was given up by mistake of Convey, without authority from Hughes to give it up: that defendants acted in good faith: and that Hughes had no intention to interfere with the policy at all. He found a verdict for plaintiffs for \$5,089.

27th August, 1878, *O'Brien* obtained a rule *nisi* from Galt, J., to set aside the verdict and enter it for defendants, or for a new trial on the law and evidence, to which *T. Ferguson*, Q. C., and *O'Sullivan*, 2nd December, 1878, shewed cause. The question is, was the policy cancelled? *Marrin & Co.* effected the insurance, and they were the assured. If any question should turn on this, see *Livingstone v. Western Ins. Co.*, 16 Grant 9. Now, *Every v. Provincial Ins. Co.*, 10 C. P. 20; *Richards v. London & Liverpool Ins. Co.*, 25 U. C. 400; *McCollum v. Ætna Ins. Co.*, 20 C. P. 289; *Orchard v. Ætna Ins. Co.*, 5 C. P. 445; *Beemer v. Anchor Ins. Co.*, 16 U. C. R. 485; *Davies v. Home Ins. Co.*, 24 U. C. R. 364, all shew that no one but the party in whose name the policy is issued can sue on it. It was the merest mistake giving up the policy. Convey, the assistant book-keeper of Hughes, had no authority from Hughes to do so. Then, there was no authority to cancel the policy. On this point see *Xenos v. Wickham*, L. R. 2 H. L., at p. 321, per Lord Cranworth. A person to whom a loss is made payable is not an assignee. *Grosvenor v. Atlantic Fire Ins. Co.*, 5 Duer. 517, is against the plaintiffs, but the case has

not been followed. They also referred to *Hale v. Mechanics Ins. Co.*, 6 Gray 169; *Loring v. Manufacturers Ins. Co.*, 8 Gray 28; *Washington Fire Ins. and Atlantic Fire Ins. Co. v. Kelly*, 5 Bennett, 302.

Robinson, Q. C., and *O'Brien*, contra. The words are, loss, if any, payable to Hughes. In the absence of any notice to the company, the company may deal with the party to whom the loss is payable. There is no injustice in construing the policy in this way. If Hughes could have sued, as *Bank of Hamilton v. Western Ins. Co.* seems to shew, he could release the company. *Clinton v. Hope Ins. Co.*, 45 N. Y. R. 544; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. Rs. 619, shew that where a policy is made in this way, the payee is the proper party to sue. See also *Ennis v. Harmony Fire Ins. Co.*, 3 Bosworth, 516.

28th December, 1878. HAGARTY, C. J.—We do not see how we can hold that, on the evidence adduced, the findings of the learned Judge are not warranted. We think we should have arrived at similar conclusions on similar testimony.

It seems abundantly clear that the insurance was effected in good faith by the plaintiffs for their own protection acting under the advice of the wholesale merchant whose goods they had bought on credit, making the loss payable to him for his protection, signing the application and describing the property in the ordinary way. We see no reason for acceding to the argument that he should have been the plaintiff.

We are not now considering whether a person to whom a loss is made payable, and who would be absolutely entitled to the sum assured if the loss occurred, might not sue in his own name in accordance with the legislation of the last few years. All we have to hold is the very plain proposition, that these plaintiffs have an undoubted right to sue in their own name, the interest of the persons named as the payees of the loss, if any, being wholly contingent

on the state of the account when the right of action accrued.

The defence has two difficulties to surmount: 1st. Was there an effective cancellation of the policy by Messrs. Hughes, assuming that the latter had the right to surrender? 2nd. Would the plaintiffs be bound by Hughes' acts without their assent or knowledge?

Both points have been in effect found against defendants.

The defendants no doubt fully believed that Hughes had the right or had plaintiffs' authority to make the surrender, but we think they took upon themselves the risk of the existence of such authority.

We are unable to accede to the argument that, whenever a loss is by the terms of the policy made payable to a person other than the assured, that such person has, by law, the right to deal with the policy as his own, and if he please agree to its cancellation.

It may be conceded that, as far as the payment to him is concerned, he may surrender his claim; but the person, who, as owner of the property, is named as the party insured, must we think, if he retains his interest in the property, be entitled to his indemnity for the loss to the extent of such interest up to the amount insured.

The defendants did not in fact materially alter their position by the arrangements alleged to have been made with Hughes. The fire occurred within two days of the final arrangement, and the unearned premium allowed by them in the alleged settlement was promptly tendered back to them, and can still, of course, be retained by them.

The only really doubtful point on the evidence seems to be, whether plaintiffs knew or did not know of defendants' suspension by Hughes' letter or otherwise. But even if they did know it, we can hardly say that their doing nothing thereon till the fire, bars the action against defendants for the loss. There is no evidence whatever that they ever authorized Hughes to surrender or cancel.

The letter does not tell them that Hughes proposed to

re-insure, but leaves it wholly to them to say whether they would re-insure in Barrie or in Toronto. Their simply doing nothing, on receipt of this letter, can hardly amount to a consent on their part that Hughes should surrender the policy—a surrender in fact not consummated till the 20th of September, two days before the fire.

We think the rule must be discharged.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

GOUINLOCK V. THE MANUFACTURERS AND MERCHANTS
MUTUAL INSURANCE COMPANY OF CANADA.

Insurance—Statutory conditions—R. S. O. ch. 162.

To a question contained in an application for insurance, "For what purpose are the premises occupied?" the answer was "Dwelling, &," which the learned Judge found to mean "&c." *Held*, that this meant dwelling *et cetera*, and that on the evidence as to what passed between the applicant and the agent, notice was given that the premises were occupied for another purpose also—a drinking saloon, as it appeared. It also appeared that the Company's agent had the fullest knowledge of the existence of the saloon, and that it had been the subject of discussion between such agent and the applicant, and further, that the chief agent had certified on the back of the application that he had personally inspected the premises and recommended the risk.

Held, that there was no breach of the first statutory condition, (R. S. O. ch. 162), and that plaintiff was entitled to recover.

THIS was an action on a fire policy for \$800, upon a two story rough-cast building, destroyed by fire.

The case was tried at the last Fall Assizes at Brantford, before Paterson, J. A., without a jury, and a verdict was found for the plaintiff for \$864.

His judgment, which is to be found below, gives a very clear statement of the pleadings and facts, with his findings on the case.

PATTERSON, J. A.—The plaintiff declares upon a policy for \$800 upon “a two story rough-cast building, particularly described in the said policy,” and which was totally destroyed by fire.

The defence rests upon the 2nd, 3rd, 5th, and 6th pleas.

The second plea sets up a breach of the first statutory condition, which is, that if any person shall insure his building or goods, and shall cause the same to be described otherwise than they really are, to the prejudice of the company; or shall misrepresent or omit to communicate any circumstance which is material to be known to the company, in order to enable them to judge of the risk they undertake, such insurance shall be of no force in respect to the property in regard to which *the misrepresentation* is made; and it avers that the plaintiff in the application for the insurance caused the building to be described otherwise than it really was, to the prejudice of the defendants.

This plea assumes that the condition refers to the description given *in the application*, which may not be correct. It seems to me to refer to the description in the policy, as it does not speak of *describing* the building, which is what the applicant does in the application, but *causing it to be described*, which is what the company do at his instance in the policy. On this issue, however, I must take the application, and I there find the description of the building to be “rough-cast,” “18 × 36.” “Two stories.” The only misdescription in this is in the figures 36. It apparently should have been 18 × 70. This misdescription was not to the prejudice of the company, or at all events it is not in any way shewn by the evidence to have been to their prejudice. It is not only shewn as a fact, that the agent who took the application, viz., McKenzie Mills, son of the agent, personally went to the building and drew the diagram and application, but S. Mills, the more formally recognized agent, certified that he had personally inspected the premises and recommended the risk.

I find against the defendants on the second plea.

The third plea sets up the same condition as the second, but it does not correctly set out the condition as it appears upon the policy. It sets out a condition avoiding the insurance for a misrepresentation *or omission*, interpolating those words after the word "Misrepresentation," where I have underlined it above. The condition on the policy is as I have above extracted it.

The breach relied on under the third plea is an omission. Neither of these pleas sets out the particular fact relied on as a breach of the condition. The pleas would certainly have been open to objection on this ground; but issue having been taken upon them, the defendants have been left at liberty to prove any facts which will sustain the general allegation.

The charge is that to the 10th question of the application, "For what purpose are the premises occupied?" the plaintiff answered "Dwelling, &" omitting to state that besides living in the house, his tenant kept a saloon in it. I think the fact that a saloon was kept in the building was material to be made known to the company. It is shewn that the minimum rate for a saloon is 2.40 per cent. and this risk was taken at 1½.

I do not think there was any misrepresentation "Dwelling, &," I have no doubt was meant for and was understood as meaning (if any attention was paid to it), "Dwelling, &c." It is argued that the character "&" meant merely "and," and was employed to connect that answer with the one given to the next question, which formed the second part of the question No. 9 viz., "How many tenants?" But it is clear to my mind that the answer "one" was quite independent of the other, and that the character "&," which is the symbol of "et," was meant to denote "et cetera," and to convey that the building was not occupied solely as a dwelling house.

But while there was no misrepresentation, there was the omission to communicate the circumstance that the building was used for a saloon. The younger Mills, who

took this application on behalf of his father, who was the formally appointed agent, and who thus took applications with the knowledge and consent of the defendants, knew perfectly well that the saloon was there, and omitted to state the fact in the application, because he understood that the license would cease at the first of March, a by-law under the Dunkin Act having been passed; and taking the application on the 5th of January he in some way satisfied himself that it was right to omit the mention of the saloon. It is shewn on all hands that the rate of $1\frac{1}{2}$ is an outside rate for a dwelling house. The secretary of the company suggests that it was made so because of the proximity of a hotel. My own opinion is, that Mills intended to cover in that way the saloon risk up to 1st of March.

There appears to be formidable difficulty in the plaintiff's way upon this plea. I shall, however, enter a verdict for him upon it, leaving the defendants to urge their points before the Court *in banc*, where they can be more deliberately considered. The grounds on the plaintiff's side on which I act are the following:—

1. Although the form of application directs the applicant to answer the questions as a description on which the insurance is to be *predicated* (the meaning of which I can only venture timidly to guess at without much assistance from the signification of the word), yet the circumstance was known to the younger Mills, and must also have been known to his father, who certifies that he personally inspected the premises, and who took the plaintiff's money and note, and gave him his interim receipt.

2. The condition set out in the plea is shewn not to be that contained on the policy; and the condition on the policy does not avoid the insurance for an omission.

3. If I am justified in the inference that the rate was fixed as high as it was in order to cover the saloon risk till March, the defendants were not prejudiced by the omission. The subsequent extension of the license till May, was the act of the Legislature.

The fifth plea relies on the circumstance that the defendant did not furnish with his proof of loss the statutory declaration required by the statutory condition which the plea sets out. The fact was, that an affidavit taken before a J. P. was furnished instead of a statutory declaration. I think the replication to this is proved and the defect cured. Mr. Hardy points out that the condition, as set out, does not defeat the action for want of the proofs directed to be given. I should allow the plea to be amended, if necessary, by setting out condition 16, which makes the proofs conditions precedent to the right to payment; but the question does not properly arise on the issue in fact.

The defence attempted by the 6th plea is fraudulent over statement of loss. There is no sufficient evidence, or indeed any evidence of fraud, even on the assumption that the whole building was not insured. In my construction of the whole contract, however, the whole building was insured.

I understand the building to have consisted of a front part, which was 18 by 36, and which stood on a stone foundation and had a cellar under it. This ran back, as I gather from the evidence, from the street to the brow of a hill which sloped rapidly down to the river. The rear part of the house, which was 18 by 34, was over this declivity, being supported and kept up to the level of the front part by posts. This part may or may not have been built at the same time as the front. The evidence does not shew how this was, but it all was one house. The description, 18 x 36, was only correct as applied to that part which could be measured on the ground, or that which had the stone foundation, and of course it did not correctly give the dimensions of the whole house. But that *falsa demonstratio* is by no means conclusive that only the half of the house was insured. It is clear that the plaintiff sent young Mills to look at the whole house and to describe it all, and supposed that it was all described. I think he was correct in that supposition. The description in the policy is, "A two story rough-cast building, 18 by

36, occupied as a dwelling, marked No. 1 on diagram." It was not half a house, but a whole house—one occupied as a dwelling, not as half a dwelling. The diagram referred to is on the application; and turning to the application all question is removed by an answer to question 11—"External exposure?" "North, 8 feet from brick store. East, *isolated by river*. South, joins brick hotel. West, street 66 feet."

What is isolated by the river? Not half the house, but the whole house. That is what the application described, and what the senior agent personally inspected, as he certified on the back of the application, and the risk on which he recommended.

There remains only the question of damages. No witness has been called by the defendants to throw doubt on the valuations made for the plaintiff or to afford me any data for reducing their valuations because the building was originally put up a good many years ago. The valuation in the policy, on which the agent after personal inspection recommended the risk, was \$1,200, a smaller sum than it is valued at by the witnesses. I think the plaintiff is entitled according to that valuation, and to have a verdict for \$800 and eleven and a half months' interest, \$46. Verdict for \$846.

November 19th, 1878. *Osler*, Q. C., obtained a rule *nisi* to enter a verdict for defendants, upon the ground that the defendants' second and third pleas, or one of them was proved.

December 5th, 1878. *Hardy*, Q. C., shewed cause. The third plea was not proved, and the Judge so found. There was no misrepresentation, for he used the premises for a dwelling as well as for a saloon, the latter use to cease in about three weeks, as the Dunkin Act had passed and would then be in force. The agent, too, was aware of this. He filled up the application and the existence of the saloon was discussed between plaintiff and him: *Benson v. Ottawa Agricultural Ins. Co.*, 42 U. C. R. 282; *Naughton*

v. *Naughter*, 43 U. C. R. 121 ; *Johnston v. Canada Farmers Mutual Ins. Co.*, 28 C. P. 211. The Court will not interfere with the finding of the Judge who tried the case, when it is a mere matter of costs which is at stake.

F. Osler, contra. "Misrepresentation" covers just such a case as this. The application forms the basis of the contract, and the applicant is bound by it, especially where, as here, he is an intelligent man. At the foot of the application is a contract that "the foregoing" is a true exposition of all the facts relating to the property sought to be insured. It will not do to say that the agent was aware of the saloon, and in fact filled up the application: that does not relieve the applicant, for if he concurs in a misrepresentation, he must take the consequences of it: "two wrongs cannot make a right." And, because the agent arranged with the applicant a rate based upon the intended discontinuance of the saloon after a certain date, does it follow that the company are thereby disentitled to be informed as to the then actual user of the property? Surely not, and reference is directed to *Shannon v. Hastings Mutual Ins. Co.*, 2 App. R. 81 ; *Billington v. Provincial Ins. Co.*, 2 App. R. 158 ; *Williams v. Canada Farmers Mutual Ins. Co.*, 27 C. P. 119.

December 28, 1878. HAGARTY, C. J.—On the whole case we feel inclined to adopt the views so clearly expressed by the learned Judge.

He finds that the flourish or figure after the word "dwelling," means "&c." We do not dissent from that conclusion. Then the question stands: For what purpose are the premises occupied? Answer, "Dwelling, *et cetera*," occupied for the purpose of a dwelling and other purposes.

We agree that to describe the place as a dwelling house, and omitting to add that a drinking saloon was in it, and inducing the defendants to accept it for insurance simply as an ordinary dwelling house, would bring it within the statutory conditions.

But the plaintiff, in adding the "&c.," gave notice that

there was another purpose for the occupation, and we cannot omit to notice that in using that description he was aware that the agent, acting for the company, had the fullest knowledge and notice of the saloon being there; so that he and the agent, as their joint work, produce the application and diagram as the result of their personal knowledge and examination of the premises, and the existence of the saloon is a subject of discussion between them.

It is difficult, under such circumstances, to hold that the case is brought within either the letter or the spirit of the statutable conditions relied on by these pleas.

Plaintiff did not either insure his buildings or cause them to be described otherwise than as they really were to the prejudice of the company, nor did he misrepresent or omit to communicate any circumstance which was material to be made known to enable them to judge of the risk. Everything was frankly communicated and shewn, and the written statement, under the circumstances, must be held sufficient.

As the learned Judge points out, the chief agent (Mill's father), certifies on the back of the application that he had personally inspected the premises and recommended the risk.

The learned Judge was also of opinion that the rate was fixed as high as it was in order to cover the saloon risk for the few weeks before the Temperance Act should come into force, shewing still more clearly the full knowledge of defendants, and that nothing was really concealed, omitted, or kept back.

Adopting, as we do, the learned Judge's conclusions, we do not feel it necessary further to discuss the questions raised.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

HARE V. HENDERSON.

Innkeeper—Fire—Death of guest—Liability.

Held, on demurrer to the declaration set out below, that an innkeeper is not responsible for neglecting to warn his guest of the breaking out of a fire in the building so as to enable him to escape, and therefore that the innkeeper is not liable in an action by the guest's personal representative for damages in consequence of the death resulting from such fire.

DECLARATION by Jane Hare, administratrix of John Hare.

“That the defendant was an innkeeper, and kept a common inn for the accommodation of travellers, and the said John Hare in his lifetime, as and being a traveller, was received into the said inn by the defendant, and the said John Hare thence, and until and at the time of receiving the injuries hereinafter mentioned, abided as a traveller and guest in the said inn, and while the said John Hare was so abiding as such traveller and guest at the said inn, and during the night time, and while the said John Hare, as such guest as aforesaid, was sleeping in a room in the said inn, the said inn caught and became on fire, and thereupon it became the duty of the defendant to warn the said John Hare of the said inn being on fire, and to assist him in escaping out of the said inn, and there was sufficient time from the breaking out of the said fire in the said inn, and from the time the defendant had notice of it, and before the fire reached the part of the said inn where the said John Hare was sleeping, to have enabled the defendant to warn and disturb the said John Hare, so as to enable him, the said John Hare, to escape from the said inn, yet the defendant did not warn the said John Hare, nor inform him of the said fire, but so negligently conducted himself in that behalf that the said John Hare was thereby wounded, injured and bruised in and by the said fire, and in consequence thereof, and of the injuries so received, the said John Hare afterwards, and within twelve calendar months next before this suit, died.

And the plaintiff, as administratrix as aforesaid, for the benefit of herself, as the wife of the said John Hare, and of William Henry Frederick Hare, Sarah Jane Hare, Ann Elizabeth Hare, Robert John Hare, Samuel Albert Hare, and Mary Adeline Hare, the children of the said John Hare, according to the statute in such case made and provided, claims \$10,000."

Demurrer: That it was not the duty of the defendant, as in the declaration mentioned, to warn and notify the said John Hare of the said inn being on fire, and to assist him, the said John Hare, in escaping out of the said inn.

Lount, Q. C., appeared in support of the demurrer.
McCarthy, Q. C., contra.

May 31st, 1878. GWYNNE, J.—Judgment in this case must be for the defendant upon the demurrer. The declaration states no *act of commission* which is relied upon as negligence, and that seems to be essential to entitle a plaintiff to recover in an action of this kind: *Southcot v. Stanley*, 1 H. & N. 251. Moreover, whatever moral duty may have been imposed upon the defendant to call the deceased, if the defendant himself had time, and was in a position to do so, I don't see that his omitting to perform that duty was the *causa causans* of the deceased's death. The fire is admitted to have been purely accidental, and it follows that the death from an *accidental* fire must be regarded as being itself accidental.

From this judgment the plaintiff appealed to the full Court.

November 25, 1878. *McCarthy*, Q.C., for the plaintiffs. Though a landlord may not be responsible for the breaking out of a fire, still when a fire has broken out there is a certain responsibility as to his guests cast upon him. Here there was ample time after the discovery of the fire to warn the plaintiff of his danger, so that he might have escaped.

Lount, Q.C., contra. The fact that there never before has been such an action is the best answer to this: *Addison* on Torts, 4th ed., 249, 500; *Wharton* on Negligence, ed. of 1874, sec. 678. If the action will lie at all, so also will an indictment for criminal negligence.

December 28, 1878. HAGARTY, C. J.—We think the judgment of Gwynne, J., against the declaration must stand. The case is confessedly one of first impression, and Mr. McCarthy frankly admitted he could produce no authority.

There is little in the books on the subject. *Bacon's* Abridgment, "Innkeepers," C., "If the guest be assaulted and beaten in the inn, he shall not have an action against his host," citing *Calye's Case*, 8 Co. 32, 1 Sm. L. C. 108.

That case discusses the point a little at page 206. "The words are *hospitibus damnum non eveniat*. These words are general, but they are restrained by the preceding words, *bona et catalla*, which restrain the latter words only to movables, and therefore by the latter words if the guest be beaten in the inn the innkeeper should not answer for it, for the injury ought to be done to his movables which he brings with him; and by the words of the writ the innkeeper ought to keep the goods and chattels of his guest, and not his person; and yet in such case of battery *hospiti damnum evenit*, but that is restrained by the former words."

We ought to be very careful in creating a new liability, and we think this declaration attempts so to do. Even if the duty of the innkeeper were as extensive as the plaintiff seeks to put it, it would be quite consistent with the pleading, that the defendant had no reason to believe, and did not believe, that the fire would reach that part of the house where Hare was, and was engaged all the time in trying to extinguish it, believing he could succeed in so doing.

Any pleading seeking to fasten such a liability on a mere nonfeasance, ought to shew beyond reasonable doubt

a clear neglect of some legal duty. Very serious difficulty also exists in holding that the alleged breach of duty by the defendant was the proximate cause of the injury.

It would be easy to suggest many startling illustrations of the possible effect of establishing the principle urged by the plaintiff. It is sufficient now to say that we think the count discloses no cause of action.

ARMOUR and CAMERON, JJ., concurred.

Judgment for defendant on demurrer.

REGINA V. STEWART.

Criminal law—Larceny—Evidence.

Held, CAMERON, J. dissenting, that the prisoner was properly convicted, on the evidence set out below, of the larceny of certain articles connected with a mill which he had rented from the prosecutor, and that in the manner in which the case was reported, the only question for the Court was, whether in any view of the evidence the prisoner could have been found guilty.

THIS was a case reserved for the opinion of this Court, by the Junior Judge of the County of Simcoe, at the General Sessions of the Peace, held at Barrie on the 12th of June last.

The indictment charged the prisoner with stealing two endless chains, one shaft about twelve feet long, three shafts about three feet long, three cog-wheels, five iron boxes, ten belts, five small wheels, one foot for shaft, one balance wheel for drag saw, one iron pulley wheel and head of tumbling shaft, the property of John H. S. Drinkwater.

The evidence material to the case, with the objections taken by the prisoner's counsel, appears in the judgment of Mr. Justice Cameron.

December 3, 1878. *McCarthy*, Q. C., for the prisoner. The indictment should have been for stealing the fixtures under sec. 20 or 75 of 32-33 Vic. ch. 21, D. instead of for larceny. On the authority of the case of *Regina v. Martin*, 2 C. & K. 956, it was quite competent for the Judge, after the conviction of the prisoner, to have reserved the points raised for the opinion of this Court. *Rose v. Hope*, 22 C. P. 482, has no application where they are tenant fixtures. The legal estate in the fixtures was in the mortgagee (Drinkwater) and the equity of redemption in the prisoner. The evidence does not sustain this indictment, which ought to have been in a special form, under sec. 20 or 75 of the Act already cited, and not for simple larceny, of which he could not be guilty, as he was in possession. There could be no amendment, the powers as to which are under sec. 71 of ch. 29, 32-33 Vic. On the question of fixtures see *Grant v. Wilson*, 17 U. C. R. 144.

J. G. Scott, Q. C., contra, contended that the question simply was whether there was legal evidence to support the charge, which he submitted there was, citing *Regina v. Gooch*, 8 C. & P. 293.

December 28, 1878. CAMERON, J.—The prisoner's conviction on the indictment as framed, namely, for simple larceny, can only be sustained in one of three ways. 1st. If there was evidence for the jury that the prisoner had committed simple larceny. 2nd. If the evidence established that the prisoner was a bailee of the goods, and had fraudulently taken or converted them to his own use or the use of some other person, bringing the case within section 3 of chap. 21, 32-33 Vic. D. Or, 3rd. If the goods alleged to have been stolen were let to the prisoner to be used by him in or with any house or lodging, and were not fixtures under sec. 75 of the above Act. The point or points intended to be reserved are not very clearly defined, but the whole evidence is returned, and the objections of law to the right of the Crown to secure a conviction are stated, and the learned Judge then proceeds to say: "These questions of

law I then decided to reserve for the opinion of the Court of Queen's Bench, in order that the prisoner should get the benefit of them if the objections should be decided in his favour." These objections are, as I understand the intention of the learned Judge in reserving the points, those taken by Mr. Pepler, the prisoner's counsel, at the close of the case for the Crown, and those taken by Mr. McCarthy, also counsel for the prisoner, when the judgment and sentence of the Court were moved for after the verdict.

Mr. Pepler's objections were :—

1. There was no case to go to the jury, because the prosecutor admits he was only a mortgagee of the goods.

2. The mill was rented for ten years, and as a tenant the prisoner had a right to do what he liked with the property, so long as he did not make away with it.

3. The Crown cannot succeed under sec. 3, ch. 21, Act of 1869, unless the time has elapsed for which the bailment took place, and no expiration of the bailment is shewn.

Mr. McCarthy's objections were :—

1. The indictment is for larceny. On the evidence the prisoner (if liable to a criminal prosecution at all) can only be so liable under the 75th sec. of ch. 21, 32-33 Vic., 1869, as a tenant, for stealing fixtures, and in that case the indictment should have been prepared under and in accordance with that section, and the case brought within its terms at the trial.

2. That although the parties (prosecutor and prisoner) apparently bore to each other the additional relation of mortgagor and mortgagee as to all or some of the property, alleged to have been stolen, as far as compatible with the relation of landlord and tenant, yet the whole case shewed that it was a mere question of account with such mortgagee, and that the prisoner had endeavoured to so arrive at a settlement, and that he regarded the property as his own subject to settlement, and so claimed under colour of right at the least.

Upon the whole case it appears the goods mentioned in the indictment were at first the property of the prisoner :

that they were placed by him in a saw mill which he had leased from the prosecutor, John H. S. Drinkwater: that the latter claimed to own them in all or in one or more of three ways; first, by their having been placed in the mill, by which I understand is meant having become affixed thereto. The prosecutor's evidence as to this is, "I consider the property mine when it was put up in the mill." Secondly, through a chattel mortgage made by the prisoner to the prosecutor, to secure the latter's claim against the prisoner; and thirdly, by an assignment from Mr. Alport, an official assignee, to whom, under the Insolvency Law, the prisoner had made an assignment of his estate and effects for the benefit of his creditors.

The only evidence of importance relating to the ownership and possession of the property, is that of the prosecutor, the said John H. S. Drinkwater, which, as far as material, was as follows: "The prisoner lives on the same lot as I do. I own a saw mill. Rented it to prisoner, in 1874, I think, for ten years, under verbal lease. \$300 a year, taxes and repair. He paid me \$50 for the first and two quarters after that. He continued under this arrangement till he failed two years ago. He made an assignment in insolvency to Mr. Alport, and asked me to become his security. I had taken a chattel mortgage for my claim on the 2nd of April. In it were included some of the articles he is now charged with stealing—the trimmers, shafting, drag saw, and shafting. Since the chattel mortgage none has been put in the mill. I became his security on the composition notes. I have paid part of them. I recognize the assignment produced as the one made to me by Mr. Alport, of the property in the mill. I allowed the prisoner to go in the mill, he to pay me rent. In November last I observed the trimmers were out of order, and were in a corner. He said the men had broken them. A short time after I went again, and they were gone. He said he had sent them to the founder." (Note, the trimmers are not included in the indictment.) "Afterwards I noticed some of the machinery, a wheel of the drag saw, was gone.

I went to a new mill he was building and found the wheel of the drag saw, chains and some irons close to the house adjoining. I went in, and they shewed me some more machinery up stairs, belts, &c., which had come from my mill. This was on the 16th of April. Next day but one I went to take possession of them, but they were gone. * * * The things mentioned in the indictment were found, some in the loft, some in the milk-house. They were the same I had seen at prisoner's house and mill previously, my property. If the prisoner had paid me the amount of the composition notes, I would have given him back the property, but I was not bound to. I took the assignment as security. Since the prisoner went on with the business, I received some money from Robert Thompson, for lumber sent him by prisoner. I drew on him, prisoner told me to. I drew several times. I would then pay prisoner's debts incurred about the mill. I handed him the money. He was to give me \$2 a thousand for my timber. I received orders on Quinn for \$200, out of which I applied \$150 for rent and the rest on account of timber. I had to pay Mr. Alport for expenses connected with the insolvency. I received \$3 for shingle belts. I am on the wrong side of the books. Never have had a settlement. I considered the property mine when it was put up in the mill. * * * The property received from the assignee was not more than the amount he owed me. I consented to allow the prisoner to go on for the rest of the term of ten years, provided he paid me my rent."

Mr. *Alport*, the official assignee, said: "Prisoner made the assignment shewn me. The assets are represented as worth \$1,800; the property appeared to be at the mill rented from Mr. Drinkwater. After deed of composition and discharge was confirmed, under authority from prisoner I assigned the property to Mr. Drinkwater. I had my son in possession up to confirmation of deed of composition and discharge, when the assignment was executed by me to Mr. Drinkwater."

Richard Drinkwater said: "The articles charged in the

indictment were in the mill at the time of the chattel mortgage to my father, and at the time of the assignment to Mr. Alport. I have seen them since they were found in Connor's custody: they are the same as were taken out of the mill. A day or two afterwards I saw prisoner and told him a few things were missing. He said he would bring them back, and he showed me where they ought to go. Any thing missing he said he would bring back, as he had them."

Other evidence was given to show *mala fides* in the prisoner in concealing the property.

To me all this evidence clearly shows the actual possession of the articles mentioned in the indictment was in the prisoner; and if so, upon the authorities, I think it clear an indictment as for simple larceny could not be sustained, as to constitute the offence there must be a taking with felonious intent from the possession of the owner or some one else intrusted with the possession, other than the prisoner himself, for the benefit of the owner. If a third party has the right to the immediate possession as against the owner, in an indictment for the larceny the property must be laid in such person and not in the owner.

Then, secondly, was the prisoner a bailee of the goods within the meaning of section 3, ch. 21, 32-33 Vic? I think not. The prisoner must, on the evidence, be held to have received the goods, if it can be held that he was ever actually out of possession of them, either as his own, subject to the payment of any sum the prosecutor might be called on to pay for the prisoner on account of the composition notes, or as mortgagor under the original mortgage, or with the mill to be used by him for the balance of the ten years, and he would not in any of these cases be a bailee within the meaning of that clause. A bailee under that clause is one to whom is delivered, or who has received for the bailor goods to be specifically delivered to the bailor in specie: per Cockburn, C. J., in *Reg. v. Hassal*, 1 L. & C. 58; but the prisoner received the goods as one having an independent

right to the immediate possession of them, and to hold them against the prosecutor subject to the determination of the said term and the prosecutor's rights as mortgagee.

Thirdly, were the goods let to be used by the prisoner in or with any house or lodging, within the meaning of section 75? The evidence establishes that the property had been the prisoner's: that he had been tenant of the mill of the prosecutor under a verbal lease for ten years: that during this term, and before its expiration, and before his insolvency, he had put the property up in the mill where it may or may not have been in law a fixture, and while it was so in the mill he mortgaged it to the prosecutor, after which he became insolvent, assigned to Alport, the official assignee, made a composition with his creditors, was to get back his property, and had it conveyed to the prosecutor as security for his liability on account of endorsing the composition notes made by the prisoner. It does not appear that the prisoner was ever excluded from the actual possession of the demised premises, though the assignee entered and held till the deed of composition and discharge was confirmed, when with the prisoner's assent he assigned them to the prosecutor. Now the prosecutor had no better title or larger claim than he would have had if the assignee had assigned the property back to the prisoner, and he had assigned it to the prosecutor. In that case the latter would have been only a mortgagee.

In *Regina v. Pratt*,¹ Dears. C.C. 360, the prisoner assigned goods by deed to trustees for the benefit of creditors, remaining in actual possession thereof, and he removed them in order to deprive the creditors of them: *Held*, that he was not guilty of larceny, because he was in lawful possession of the goods.

Here the prosecutor allowed the prisoner to go on for the rest of the term of ten years, received rent and other money from him. There is not one word in the evidence about his taking possession himself of either the land or the chattels, and certainly nothing said about his letting the chattels in or with the house or lodging to the prisoner; and if they

were let it was simply under the permission to continue on as before for the residue of the term, in which event they could only have passed as fixtures, and so part of the realty ; or they continued to be held by him as mortgagor, in which relationship he stood in respect to them before the insolvency.

If there had been a taking by the prisoner of the articles mentioned in the indictment, or any of them, out of the prosecutor's possession, it would have been a question for the jury whether, under the circumstances, he did so under a claim of right ; but the possession being in himself there was no taking, and so as matter of law no larceny. Treating the goods as let to the prisoner with the mill, a further question arises. Is a mill a house or lodging within the meaning of section 75 ? I think it is not. The word "house," in Criminal Statutes and at Common Law, means a dwelling-house : *Elsmore v. The Hundred of St. Briavelly*, 8 B. & C. 461 ; and there is nothing in the evidence to shew the mill was a dwelling-house, and the name does not import it. The prisoner may have acted very improperly or dishonestly : that would much depend upon the state of accounts between him and the prosecutor, which could not be properly enquired into on an indictment for larceny, and under such indictment he cannot be found guilty on account of any moral delinquency or turpitude not amounting to larceny.

I am therefore of opinion the conviction of the prisoner on the present indictment was wrong, and should be reversed.

HAGARTY, C. J.—I do not see anything we can do except to affirm the conviction. We cannot see in the evidence whether the articles in question were or were not fixtures ; nor can we but conjecture when, if ever, they were severed.

One of the points taken and submitted is, as to the motives of the prisoner, that it was done to obtain a settlement of accounts ; that it was a matter between mortgagor

and mortgagee, and that he regarded the property as his own. This was matter of fact for the jury, whether the articles were taken under claim or colour of right, or as a mere civil trespass, or *animo furandi*.

We cannot adopt the argument of his counsel without importing into the case matters not reported to us.

If the felonious intent be found, as we must presume it was by the jury, we cannot say the evidence at law does not support an ordinary indictment for simple larceny. If the evidence shewed that the prisoner was the tenant, he might be guilty of stealing either fixtures or mere chattels held under the letting. We cannot, as already noticed, say that these articles were not mere chattels.

It seems to me to be very clear that, unless I can see there was no legal evidence for the jury on which, in any view they can take of such evidence, the prisoner could be convicted, I must affirm the conviction. It is not for me to say to which of several views in which the evidence is capable of being regarded, the weight of evidence inclines, or which view I adopt. The facts have not been found on which we can say in what relation as to the possession or ownership of these goods the prosecutor and the prisoner stood. The evidence, I think, is sufficient to submit to a jury, and it seems to me that I cannot say that on that evidence the jury cannot legally find that a larceny was committed. If I adopt the arguments of prisoner's counsel, I am treating the case as if it were a motion for a new trial on the weight of evidence. The jury may have concluded from the evidence that the goods were the property of the prosecutor; that he had had both the property and the possession of them from the assignee; that with the prosecutor's license and assent they were used by or bailed to the prisoner, who then feloniously stole them.

I cannot say such a conclusion is unsupported by legal evidence.

A reference to such a case as *Regina v. Pratt*, 1 Dear. C. C., 360, will shew how the legal questions reserved for

the Court should have been stated on questions duly submitted to and found by the jury.

See *Regina v. Reed, Ib.* 168, 257.

ARMOUR, J., concurred.

Conviction affirmed.

REGINA V. WILSON.

Libel—Criminal information.

The Court, following recent English decisions, confining the granting of criminal informations for libel to the case of persons occupying an official or judicial position, and filling some office which gives the public an interest in the speedy vindication of their character, or to the case of a charge of a very grave or atrocious nature, refused leave to the manager of a large railway company to file a criminal information for libel, on the ground that he did not come within the description of persons referred to.

November 21, 1878. *E. Martin*, Q. C., obtained a rule *nisi*, on behalf of Frederick Broughton, Esquire, general manager of the Great Western Railway Company of Canada, calling upon the defendant to shew cause why a criminal information should not be filed against him for libel.

The libellous matter complained of was contained in two issues of a newspaper called "The New Dominion," published in the city of Toronto by the defendant, and dated respectively the 2nd and 16th days of November, 1878. The material part of the first article was as follows:

"A GREAT CORPORATION."

"Some strange and ugly rumours are afloat concerning the management of a great corporation, having its head quarters in the 'Ambitious City.' *The New Dominion* never makes a statement unless it can be backed up by facts. Certain documentary evidence is at this moment in our possession. * * * Then some one carrying his head high now, and riding rough-shod over his subordinates,

as he has done ever since he came to this 'blawsted country,' will creep off into the dark. * * *

We expect by next week, or at furthest by the week following, to be in full possession of an unbroken chain of evidence that will make innocent and confiding shareholders, both in this country and 'at home,' curse the day when they gave into such hands the reins of power.

He imagines he has covered up his tracks well. * * *

Commissions on coal contracts, amounting to thousands of dollars annually, commissions on various other important contracts, amounting to very large sums, are a few of the irregularities practised. * * *

Tha second article read thus:

"OFFICIAL DELINQUENCIES."

"In a recent number we referred to some very discreditable transactions on the part of a prominent official of an important business corporation, having its headquarters in Hamilton."

The writer then went on to explain why the disclosures promised in the former article did not appear in this, but stated they should do so before long.

December 6, 1878. *McCarthy*, Q. C., and *Watson*, shewed cause. The applicant is not libelled; but even if he is, it is not a matter in which the Court will interfere. He is not named, and any one else may be the party alluded to. *Taylor*, on Evidence, 7th edition, sec. 1414.

If the applicant be the person meant, he should be left to his remedy by indictment. For spoken slander a criminal information will not lie, as recent decisions shew: *Ex parte Duke of Marlborough*, 5 Q. B. 955.

Under the recent cases the applicant is not in a position entitling him to a criminal information. He does not occupy a public position; nor is the charge such as to induce the Court to grant the application: *Stephens Bl. Com.* 7th ed., 375; *Regina v. Aunger*, 28 L. T. N. S. 633; *Regina v. Plimsoll*, 12 U. C. L. J. N. S. 227; *Regina v. Wilkinson*, 41 U. C. R. 29; *Folkard* on Slander and Libel, 4th ed., 680; *Ex parte Davidson*, "Times" of 2nd August, 1878.

C. Robinson, Q. C., and *E. Martin*, Q. C., contra. These informations have been granted to persons occupying no public position at all: *Folkard*, 4th ed., 684.

Railway corporations are something beyond those of a private nature. They discharge a very important duty in connection with the public, carrying the mails, and being subject on any emergency to be turned into means of military transport; and those in their employment are on this ground subject to special legislation, and to exceptional penalties for breaches of their contracts of service: 40 Vic. ch. 35 D. The general manager, therefore, such as the applicant here is, of an important concern like these, cannot be regarded as a mere ordinary individual, such as a bank manager, or the manager of a building society, who have no such duties cast upon them as those alluded to, and he is consequently entitled to be treated with higher consideration, and to be classed with persons such as those upon whose application it is said in England the remedy will alone be granted: *Hodges on Railways*, last ed., 474; *Cox v. Feeney*, 4 F. & F. 13.

This is a matter wholly in the discretion of the Court. *Rex v. Knut*, 2 Barnd. 114, may be referred to as to what shall be said to be a libel upon a Company. *Regina v. Thompson*, 24 C. P. 254, and per Hagarty, C. J. 257, was a matter of a purely domestic character, and yet the application was granted. Besides, the exercise of this jurisdiction is in many cases most useful, and has a deterrent effect. In England, to-day, the information is granted in a grave case, and this is a grave case: it is a criminal charge which is in fact made. 32, 33 Vic. ch. 21, secs. 83, 84; *Regina v. Christian*, L. R. 2 C. C. 94; *Harrington v. Victoria Graving Dock Co.*, L. R. 3 Q. B. D. 549; *Folkard*, 166, 167.

28th December, 1878. HAGARTY, C. J.—This is an application for a rule for leave to file a criminal information.

I am quite satisfied with the *prima facie* proof offered by the applicant as to the character of the charge made

against him in gravity and tendency to injure him personally and in the office which he fills, and of its application to him, although not personally named.

On cause being shewn, affidavits were filed on defendant's behalf. No attempt was made by him to deny either the publication, or that it was not intended to apply to the applicant, or of any ground of justification. Some of the affidavits are framed in an equivocal style, which we must regret to see used in any proceeding in this Court. The intention could hardly be to throw light upon the points in issue, but to obscure them.

We should, I think, make the rule absolute but for one consideration. Is this a case in which the gentleman applying is properly within the description of persons to whom this extraordinary remedy should be granted on a charge of this nature?

We find in the *London Times* of August 2nd the report of a case, *Ex parte Davidson*, an application for a criminal information against a newspaper publisher for libel. The Court was composed of Mr. Justice Mellor and Baron Huddleston.

Mellor, J., says: "The libel was one that might well warrant an indictment or an action, but it did not follow that it was the fit subject of a criminal information. That was an exercise of the extraordinary jurisdiction of the Court which, as a general rule, was reserved for cases of libel upon persons in an official or judicial position, and filling some office or post which made it for the public interest necessary that such jurisdiction should be exercised for the refutation of the libellous charges made. That was not so in the present case, for though the applicant filled a highly useful office or employment (musical critic to the *Times*), it was not of a public nature, nor did he occupy any public office which required the prompt and summary interposition of the Court for his protection * * Upon that ground, and upon that ground alone, the libels being of a most discreditable character, the present application must be refused."

Baron Huddleston adds: "As a general rule this jurisdiction is only exercised on behalf of persons who fill an official position or occupy some post or office which gives the public an interest in the speedy vindication of their character, as a magistrate or a member of the House of Commons, for a libel respecting anything said or done by them in such character or capacity, or in the case of a private individual, where the imputation (as in the case of the *Whitehall Gazette*) is of a very grave character, in that case an imputation of murder."

Now, I am prepared to admit that the objections to the position occupied by the applicant, as here enumerated, do not seem to have been applied so strictly in other cases before the English Courts and in Canada. We do not find such objections formally stated, or any argument based thereon, but we certainly do find cases in which criminal informations have been granted at the instance of persons not coming within the characters here described. See a summary of cases in *Cole*, p. 15.

But there is no doubt whatever that the granting of any such application is a matter wholly in the discretion of the Court.

The law, as stated by *Blackstone*, is constantly referred to: "The Court will not, in the exercise of a sound discretion, permit such informations to be filed except in serious cases, as for gross and notorious misdemeanours, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the Government (for those are left to the care of the Attorney-General), but which, on account of their magnitude or pernicious example, deserve the most public animadversion."

Regina v. Aunger, 28 L. T. N. S. 633, is frequently referred to. Lord Blackburn said: "The Court will not grant it unless the circumstances are such as to shew that the relator not only has the object in view of clearing his character, but that he is also a proper person to be entrusted with it, and that the circumstances are such as to render the proceedings a public benefit."

In *Regina v. Plimsoll*, 12 U. C. L. J. N. S. 227, from the *Times*, June 16, 1873, in the Queen's Bench, the same learned Judge delivers an elaborate judgment. The applicant was a member of Parliament and a ship owner, the defendant also a member of Parliament and publisher of heavy charges against ship owners for overloading vessels, and pointing to certain ship owners then in Parliament.

The point before us did not arise. Speaking of the charges principally to be considered in dealing with the application, he says, "The other thing is to see whether the offence is of such a magnitude that it would be proper for the Court to interfere and grant a rule."

The applicant here is the manager of one of our great railway companies—the Great Western Railway—a position doubtless of great respectability, influence and importance, but we hardly think it comes within the limited rule apparently adopted by the English Court of Queen's Bench. We do not feel pressed with the suggestion that these companies may have large dealings with the government of the country and certain statutable duties imposed on them for public benefit or advantage. The same may be said of numerous other trading corporations.

Such corporations as the Great Western and the Grand Trunk Companies have, doubtless, bound up in their conduct of business a large amount of public interest. But we do not see how we can apply a rule to their managers or officers, which must not necessarily be applicable to every railway, and to every trading corporation, and, being only a question of magnitude and degree, to every business firm dealing with the public.

It will hardly be a wise discretion to grant a rule to the chief agent of a great corporation, and to refuse it to a member of a large or small business firm charged with dishonesty or trickery in the conduct of business.

Once it becomes a question of degree, the granting or refusing it by the Court assumes an unpleasant and possibly invidious character. Lord Blackburn says, in the last case cited, "We have no fixed rules to go by here, and we do

not like it; nevertheless we are obliged to exercise our discretion, and to exercise it with considerable latitude, otherwise the system of having criminal information would produce no good at all."

If we have to grant or refuse the rule according to the higher or lower, larger or smaller position or business transactions of each applicant, I think we would like it still less than Lord Blackburn appears to have done.

We think we may best exercise our discretion by adopting the limitation suggested by the recent English decision. It commends itself, we think, to our approval.

In this country there need be no delay in promptly seeking the vindication of character, either by action or indictment, the latter of course preceded by a prompt application to a Police Court, or ordinary magistrate's Court.

We feel that we are, perhaps for the first time in this Province, expressing an opinion which limits the facilities heretofore allowed for this proceeding.

In the case before us, we think we should follow the course adopted in *Regina v. Plimsoll*, and discharge the rule, without costs.

ARMOUR, J.—I agree in the result of the judgment of the Chief Justice, but I desire to guard against its being thereby assumed that I would ever concur in granting leave to file a criminal information.

I think the practice of granting leave to file criminal informations in this country, having regard to the social condition of its inhabitants and the liberties which they enjoy, is, to say the least of it, of very doubtful expediency, and should, in my opinion, be discontinued and, if necessary, abolished by legislative enactment.

The very rule adopted in England, that it will only be granted to what I may call a "superior person," is the strongest reason, to my mind, why in this country it should never be granted at all.

Whatever may be deemed desirable in England, I do not think it desirable that in this country there should exist

a remedy for the superior person which is denied to the inferior.

CAMERON, J.—The granting or denying to a private individual leave to file a criminal information is a matter of discretion, and it ought not to be exercised in favour of the application except for strong reasons shewing necessity for such a remedy.

It appears to me very undesirable that any distinction of persons should exist. Our Courts ought to be open to all alike, high and low, and it is invidious to have it said that one man may secure a remedy for a wrong, criminal or civil, in a way denied to another. Yet there is no doubt it has been the practice in England, in the case of persons holding positions connected with the Administration of Justice, and official positions, and sometimes in the case of private individuals, to grant criminal informations, while the privilege has been denied to others. There is no reason for perpetuating these distinctions in this country, and therefore in the present instance I think the application should be denied.

Conceding the highly respectable and very important position held by the applicant, there are many other like officers of private, or perhaps it would not be very wrong to call them public corporations, who might equally well seek this peculiar remedy for redress in cases of defamatory libel, and one of them could not be otherwise than chagrined and humiliated if he were denied the privilege sought in the present instance, by reason of the railway or other enterprise which he managed being less extensive or wealthy than another, whose manager had made a successful application.

There is no real necessity, as far as I am aware, for any one seeking this remedy. Any person libelled has a right to lay an information before a magistrate charging any one who may have libelled him with the offence, and may then, by his oath, deny the truth of the slanderous charges or imputations. This, except where the libel is published during the sitting of the Superior Courts, would furnish a

more speedy means to the person injured of vindicating himself than the remedy by criminal information under leave of the Court, and in all probability he would be able to bring the offender to trial earlier, as the forms of procedure through this Court are intricate and tedious. There is therefore no denial of justice in the denial of the application, and Mr. Broughton will have ample opportunity of bringing the defendant to justice, and relieving himself from the grave charges made against him, if he is in fact the person intended by the article complained of.

It is a matter very much to be regretted that the editor of any newspaper should by any possibility think himself warranted in giving publicity to an article of the kind, and had Mr. Broughton no other means of having the matter investigated, and the defendant punished, if guilty, the peculiar remedy he seeks would not be denied to him.

The rule should be discharged, but without costs.

Rule discharged. (a)

(a) The Chief Justice added that it was not to be understood that the Court laid down any absolute rule as to future applications for criminal informations, or that they meant to fetter their discretion in dealing therewith.—REF.

DAVIDSON V. HOUSE.

Insolvency—Fraudulent preference.

An insolvent, within thirty days of his insolvency, executed a mortgage to the defendant for alleged money advances. A composition was agreed upon, and as collateral security therefor, defendant assigned this mortgage to the assignee. The composition was apparently not carried out, and the plaintiff, the assignee, brought ejectment to recover the mortgaged premises, claiming both under the assignment in insolvency, and that the mortgage was fraudulent against creditors: *Held*, upon the evidence set out in the case, that the mortgage was rightly found to be fraudulent as against creditors, and that the plaintiff was entitled to recover.

EJECTMENT for an acre and a quarter, part of lot No. 12, in 11th concession of the Township of Bertie, tried at the Haldimand Fall Assizes, 1878, before Burton, J. A., without a jury.

Plaintiff claimed title—1st. By indenture of mortgage dated 22nd March, 1875, made by William Taylor House to the defendant, and by him assigned to the plaintiff, by deed, dated 13th August, 1875. 2nd. As assignee in insolvency of the estate of the mortgagor, under assignment made by the mortgagor to James McGlashan, official assignee, as interim assignee, dated 29th March, 1875, and deed of transfer from McGlashan to the plaintiff, appointed assignee by resolution at a meeting of creditors on the 21st April, 1875.

The defendant, besides denying the plaintiff's title, for defence on equitable grounds, alleged that the above mortgage was assigned to the plaintiff for the purpose of a proposed composition between the mortgagor and his creditors under the provision of the Insolvent Acts, and to be held simply as collateral security for certain promissory notes to be given by the mortgagor to the plaintiff, and for no other purpose, and which said notes were never given, and such composition was never effected, and the plaintiff should have reassigned the mortgage to the defendant.

Possession in the mortgagor at the time of the execution of the mortgage and the mortgage and assignment were put in and proved. This was the plaintiff's case.

For the defence the defendant was called, and swore that the mortgage was given in accordance with an agreement entered into between him and the mortgagor in the month of October before to secure certain loans or advances to be made by the defendant to the mortgagor: that he made advances from time to time between the 6th of October, 1874, and the 2nd of February, 1875, to the amount of \$1049.79: that he often asked for the mortgage, but did not get it till the time of its date: that he was then a clerk in the store of the mortgagor, but did not know he was then about going into insolvency: that after the insolvency the creditors disputed the validity of the mortgage, on the ground it was made so short a time before the insolvency: that a composition of seventy-eight cents in the dollar was proposed, and a deed of composition was executed—the deed was put in, bearing date 1st June, 1875—and it was agreed the defendant should assign the mortgage as collateral security for the payment of the composition: that the mortgagor was allowed to go on with the business, and purchased other goods: that the arrangement fell through, but no reason was assigned therefor, and plaintiff, as assignee, sold the stock and proceeded to wind up the estate.

The deed of composition was expressed to be made by and between the creditors of William Taylor House, the mortgagor and insolvent, of the first part, and the said William T. House, of the other part, and it was thereby agreed by the parties of the first part, that in consideration of a composition of seventy-eight cents on the dollar on their respective claims, expenses of assignees, &c., the said parties would discharge the insolvent; and it was thereby declared that it was a condition of the said deed of composition and discharge, to which the plaintiff was thereby required to conform himself and to carry out, that upon the insolvent procuring the deed of composition and discharge to be executed, and depositing it with the assignee, and depositing with the said assignee three promissory notes made by the insolvent, and payable respectively at the Bank of British North America in Hamilton, at one, two,

and three months, from the 7th day of June, 1875, each for the sum of \$500, and upon depositing with the said assignee three promissory notes of the insolvent, payable respectively at the said bank in four, five, six, seven, eight, nine, ten, eleven, and twelve months from the said 7th of June, for equal amounts, the whole with the three former notes to make an amount equal to the said composition of seventy-eight cents on the dollar, the last three of the composition notes to be endorsed by some person or persons to be approved of by the inspectors of the estate, and upon the said insolvent procuring a certain indenture of mortgage made by him to Lewis House, the defendant, the mortgage in question, to be duly transferred and assigned to the plaintiff, who would hold the same, together with the notes held by the plaintiff as part of the insolvent estate, and some other claims, as collateral security for the due payment of the said composition of seventy-eight cents on the dollar—then, in consideration thereof, without further delay, the plaintiff, on payment of his expenses, was to execute to the insolvent a reconveyance of all his real and personal property, except the portion above mentioned, to remain as collateral security.

The assignment of mortgage from the defendant to the plaintiff bore date the 13th day of August, 1875, and recited the composition deed and the agreement to sign as collateral security for payment of the composition.

No evidence was given in reply. The learned Judge entered a verdict for the plaintiff, and found that the mortgage was given in contemplation of insolvency, and was fraudulent and void as against creditors.

The evidence is more fully stated in the judgment of Cameron, J.

November 27, 1878, *J. K. Kerr*, Q. C., obtained a rule on behalf of the defendant to shew cause why the verdict should not be set aside, and a verdict for the defendant entered, pursuant to the Common Law Procedure Act.

November 27, 1878. *Walker* shewed cause. The mort-

gage having been executed within thirty days after the assignment, was, under the Insolvent Act of 1869, void. The presumption of its being fraudulent and void was absolute and not rebuttable, but if the presumption was rebuttable, the finding of the learned Judge, who saw the witness, should not be disturbed. The assignment of the mortgage by the defendant put the legal title in the plaintiff, and at most the defendant could only claim in equity to have a reference to ascertain the amount realized from the mortgagor's estate, and the amount due on the mortgage.

Kerr, Q. C., contra. The plaintiff having accepted an assignment of the mortgage as collateral security for the amount of composition, cannot now be heard to say the mortgage was void under the insolvent law; and having taken possession of the mortgagor's stock, new and old, contrary to the terms of the composition, after allowing him to proceed with the business upon the terms of the composition, and the composition having fallen through, the defendant is entitled in equity to a reassignment of the mortgage and to retain possession of the land.

December 28, 1878. CAMERON, J.—By the documentary evidence the legal estate is in the plaintiff, and he is therefore entitled to recover unless the defendant has made out a good equitable defence, leaving out of question the right of the plaintiff, as representing the creditors, to impeach the original mortgage as fraudulent and void under the Insolvent Acts.

The allegation of the defendant in his equitable defence is, that the plaintiff held the mortgage simply as collateral security for certain promissory notes to be given by the mortgagor to the plaintiff, and for no other purpose: that such notes were never given and the composition never effected.

The composition deed shews that the principal object of the deed was a composition of seventy-eight cents on the dollar, payable by instalments, for which instalments the

insolvent was to give his promissory notes, and for the last three was to obtain an approved endorser; and the mortgage, by the terms of the composition deed, was to be assigned for the due payment of the composition of seventy-eight cents; and though the assignment of the mortgage recites that it was agreed by the mortgagor that he should procure the assignment to be executed as collateral security for the due payment of certain promissory notes set forth in the deed of composition, the effect of the deed was to secure the composition, whether notes were given or not, and if not given it was the fault of the mortgagor himself.

The defendant in his evidence says, in reference to the deed of composition: "This is the deed which I understood contained the terms by (on?) which I handed over my mortgage. It was on the terms of the composition that I assented to the mortgage being handed over. I think that was not carried out. I understand it was not carried out. William Taylor House went to California. He was arrested, but the jury found no bill against him. Taylor House continued in the same house. They gave him liberty to go on and sell the goods. He went on in business. He got some new stock in his business, but not a great deal. The creditors took possession, not of the old stock only but of whatever was there. I think it was Davidson took possession. The stock was advertised for sale, and it wasn't sold on the day of the sale, but it was sold afterwards. I only saw the advertisement, and I only suppose there was a sale. I don't really know about the stock being sold. I know the goods were taken away after they were advertised by the assignee."

This is not sufficient, as against the plaintiff, to shew that the arrangement never went into effect, and certainly does not prove a payment of the composition.

Then, the mortgage is impeached by the plaintiff on the ground that it is fraudulent and void as against the creditors of the mortgagor, having been executed within thirty days before the assignment in insolvency, and this is clearly so unless it was given in pursuance of a previous agreement, in respect of which the defendant made advances.

On this head the defendant swears: "Sometime in October, before the mortgage was given, I called at his (mortgagor's) place. He saw me using some money and said he would like to have some from me. I told him I would let him have some if he would secure me. I told him I would let him have it if he gave me a mortgage on his place. I then collected some money and gave him \$300. I advanced him more till I had given him \$1049.79. I advanced these sums at different times between the 6th of October and the 2nd of February. These moneys were advanced to him as collected by me. I didn't get the mortgage till a short time before the assignment. I had demanded it from him several times. He had agreed to give the mortgage before I gave him a dollar."

On cross-examination: "There was no amount mentioned as to what the mortgage would be."

The learned Judge, who saw the defendant and heard him give his evidence, formed an unfavourable impression of him, and found that the mortgage was fraudulent and void; and certainly it is scarcely probable that there was a positive agreement to give a mortgage without the amount to be advanced being agreed on or mentioned, and it can not be said that the finding of the learned Judge is wrong.

It then remains to be considered whether the plaintiff is estopped, by taking the assignment, from disputing the *bona fides* of the mortgage. If the defendant's contention is right, that the assignment of the mortgage never in fact became a security to the plaintiff by reason of the composition arrangement having fallen through, the parties would be restored to their original position, and the plaintiff would be at liberty to attack the mortgage as fraudulent and void under the insolvent law; but I incline to the view that having taken the assignment as collateral security for the composition and retained it, and thereby having changed the position of the defendant by depriving him of his apparent title, the possession of the mortgage, and placing him in a worse position to maintain his right, the plaintiff cannot now dispute the *bona fides* of the transaction, and

if he has realized the composition, he would be bound to re-convey, and can only hold the security for such amount as may yet be unpaid.

The defendant does not rest his defence on this ground, but on the fact that the composition fell through; and moreover, he did not give any evidence from which it could be inferred the plaintiff had been paid the full composition, and so disentitled to the possession of the mortgaged premises. The plaintiff should therefore be allowed to retain his verdict, and the defendant can take the necessary proceedings, if so advised, to have an account taken of the amount due, with reference to which we do not now deem it advisable, on the facts before the Court, to make any order.

HAGARTY, C. J.—I see no reason for differing from the opinion expressed by the learned Judge, that this mortgage security was, on the evidence, fraudulent and void as against creditors.

The utmost the defendant can urge is, that by the result of the dealing with the assignee his mortgage has been accepted as a valid security for the due payment of the composition agreed upon. It was accepted merely for the purpose of such security.

If therefore such purpose has wholly failed and the composition fallen through, the transfer to the assignee has equally fallen through, and the parties are all remitted to their original rights.

In either view the plaintiff has the right to recover the land, and the defence fails.

ARMOUR, J., concurred.

Rule discharged.

CROSS V. CURRIE ET AL.

Promissory note—Accommodation indorser—Innocent holder.

Defendant B. indorsed a promissory note made by defendant C., for the purpose of renewing a former note also indorsed by him for C.'s accommodation. C., instead of retiring the former note, parted with the renewal to plaintiff, a creditor of his, who was at the time aware that B. had been assisting C. in money matters. After the note had been indorsed by C. to plaintiff, C. procured B.'s indorsement of another note at a shorter date, stating that the holders of the original note would not accept the first renewal, and promising to return the latter with the original note. It was found that there was no bad faith on plaintiff's part in taking the note: *Held*, that C. had B.'s authority to indorse the note to the plaintiff, and that the only notice the law would impute to plaintiff taking the note from C., the maker, was that B. was surety for him, and perhaps an indorser without value for his accommodation; and therefore *Held*, that plaintiff was entitled to recover against B.

THE plaintiff sued as endorsee of a promissory note made by Currie to Brown or order, and endorsed by Brown. Currie allowed judgment to go by default, and Brown pleaded that he did not indorse to plaintiff as alleged.

The case was tried at the last Fall Assizes, at Welland, before Burton, J. A., without a jury.

The facts were very short: To accommodate Currie, Brown had endorsed a note discounted by the former. It was protested, and to renew it Brown endorsed the note now in suit, and gave it to Currie to give to the bank. Currie owed the plaintiff, who was pressing him for payment.

This note was dated the 15th of May, 1877, the day on which the previous note matured. It was at three months.

On the 24th of May plaintiff, pressing Currie for payment, received this note from him and a due bill for the balance of his claim. Plaintiff said he had been told that Brown was assisting Currie, who was in very embarrassed circumstances.

Brown stated that he endorsed the note for Currie expressly to renew the note then due: that he asked Currie for the preceding note, and he promised to bring it to him.

Some time after, on the 5th of June, Currie told Brown that the bank would not renew for three months, or for over one month, and Brown endorsed another note of

Currie's at one month for the same amount, which was discounted and ultimately paid by Brown. Currie again promised to return both notes to Brown, but failed so to do.

At the time of Brown's endorsing the note for one month, the note in suit had been discounted by plaintiff, and was in the hands of the Bank of Commerce, the holders of the first protested note.

The learned Judge was of opinion that there was no bad faith on plaintiff's part, but he considered that he could not look upon the plaintiff as an innocent holder for value: that his finding the note in the possession of the maker ought to have been sufficient to put him on inquiry where he could have ascertained the truth. He considered the defendant entitled to succeed on the issue on the plea that he did not endorse to plaintiff as alleged, and entered a verdict accordingly, assessing damages against Currie for \$535.

18th November, 1878. *J. A. Miller* obtained a rule *nisi* to set aside the verdict for defendant Brown, and to enter a verdict for the same damages as were assessed against defendant Currie, on the law and evidence.

November 29th, 1878. *Bethune*, Q. C., shewed cause. Cross's position was not altered. From the form of the note defendant would know that it was accommodation paper. Any person taking a note from the maker takes it, as against the indorser, at his risk, and subject to all the equities between the parties. He cited *Bell v. Lord Ingestre*, 12 Q. B. 317; *Lloyd v. Howard*, 15 Q. B. 995; *Austin v. Farmer*, 30 U. C. R. 10; *Adams v. Jones*, 12 A. & E. 445; *Marston v. Allen*, 8 M. & W. 494; *Foster v. McKinnon*, L. R. 4 C. P. 704; *Gooderham v. Hutchison*, 5 C. P. 241.

J. A. Miller, contra. An antecedent debt is a good consideration for a note, and the plaintiff is therefore entitled to recover. There was no negligence on plaintiff's part. He referred to *Swift v. Tyson*, 16 Peters 1; *Byles on Bills*, Am. ed., 249; *Goodman v. Harvey*, 4 A. & E. 870; *Wookey v.*

Pole, 14 B. & A. 1; *Bleaden v. Charles*, 7 Bing. 246; *Gorgier v. Mieville*, 3 B. & C. 45.

28th December, 1878. HAGARTY, C. J.—On the argument of the rule it was conceded that plaintiff on the authorities was a holder for value. On the other point, in the absence of bad faith, it would seem to us that the plaintiff is entitled to recover.

It is doubtless a very unfortunate practice that seems to prevail in this country for bankers and others to take negotiable paper except from the last parties thereto. Here everything seems to be done by promissory notes, and parties desiring to accommodate others almost invariably do so by endorsing a note, where, in England, the same would be done in the form of an accommodation acceptance. But the practice here seems to be inveterate, and nothing is more common than for a bank or any creditor to take a note, or a renewal, from the maker with an endorser's name on it.

In the nature of such a transaction the creditor may be assumed to know that such an endorser is in fact merely a surety for the debt.

In the case of an accommodation acceptance or making of a note no such notice could be assumed.

Now, in this case, we of course assume that the plaintiff knew when he got the note that Brown was merely security for Currie; but are we to assume any further knowledge or notice?

Brown unquestionably authorized Currie to make some use of the note; it was to be handed to the bank to retire the overdue note. It was not in any way in the position of a stolen note, or the writing of Brown's name on a piece of paper, afterwards turned into a negotiable instrument against the will and without any such intention on the part of the writer. It was endorsed as a note of Currie's, and to be used by him. The object was to retire the overdue note in the bank.

Had the bank declined wholly to renew, and Currie

obtained the proceeds of the note by discount from a friend, and therewith paid the overdue note to the bank, we think it beyond question that Brown could have no defence against the holder.

The learned Judge seems to have thought that all authority from Brown to Currie to use this note for any purpose whatever was at an end when the new note at a month was given, and he says that "Currie had no more power to complete the endorsement by delivery to a third person, than a stranger or a thief," and that his original authority had ceased. But, as we read the evidence, Currie had endorsed it to the plaintiff while in his hands to be handed to the bank, and some days before Brown endorsed the note at one month. This is noticed by the learned Judge in a note to his judgment.

We therefore think that Currie had Brown's authority to endorse the note to a third person, although such endorsement was in fraud of the original purpose of the endorsement, so long as such third person held the position of an innocent holder for value of a current note.

We think the only notice that the law would infer to the plaintiff taking the note from the maker was, that Brown was a surety for him, and perhaps endorsing without value for his accommodation.

The law is well discussed and the distinctions pointed out in the late case, cited by the learned Judge, of *Baxendale v. Bennett*, L. R. 3 Q. B. Div. 525. See also *Foster v. McKinnon*, L. R. 4 C. P. 704.

It seems unnecessary for us to refer to the numerous other authorities that might be cited.

ARMOUR and CAMERON, JJ., concurred.

Rule absolute.

PARSONS V. STANDARD INSURANCE COMPANY.

Insurance—Prior insurance—Substitution.

Held, that an unintentional error on the part of the applicant for insurance in the name of one of the companies in which he was already insured, where the true amount of the prior insurance was given, did not vitiate the policy.

Held, also, that the true amount already upon the property being given, the fact that one policy was allowed to drop or be cancelled, and another for a like amount to take its place in a different company, did not avoid the contract of insurance because of the noncommunication to the insurers of the substituted policy, but that the statutory condition had been substantially complied with, it being really directed against the increase of the risk without the consent of the insurer.

ACTION on a fire policy, dated 28th April, 1877, covering \$2000 on stock of hardware, and in a hardware store, in Orangeville, for one year, averring loss, &c.

There were also the common money counts.

Many pleas were pleaded denying: 1. The policy. 2. The loss. 3. Plaintiff's interest. 4. Fraud. 5. Misrepresentation as to value in the application. 6. Untrue representation in the application and in a diagram as to the situation of the property, representing that no other buildings were within 100 feet of the building in which the insured property was situated, whereas there were other buildings within 100 feet of the building within which the insured property was, the same being matters material to the risk. 7. That by the application and diagram plaintiff warranted that there were no other buildings within 100 feet than those shewn in the diagram, alleging a breach, &c. 8. Breach of condition, in omitting statement of coal oil and gunpowder kept on the premises. 9. The same plea as to petroleum and gunpowder, contrary to conditions of policy. 10. As to particulars not being sent in, and omission of statutory declarations, &c., &c., and non-disclosure of amount of other insurances. 11. The non-furnishing of books of account, invoices, &c. 12. False and fraudulent statement of loss as to value, and that there were no other insurances than those mentioned in statements of loss, contrary to the conditions. 13. Setting out a con-

dition that if there were any prior insurances without defendants' assent endorsed or appearing on the policy, or subsequent insurances unassented to in writing, defendants were not to be liable; and alleging that at the time of insurance there was an insurance in the Lancashire Insurance Company of \$2000, in the Western of \$2000, and in the Provincial of \$2000, subsisting without defendants' knowledge or assent, and without their assent appearing in the policy or endorsed thereon. 14. Setting out the same conditions, and that after the making of the policy the plaintiff made further and subsequent insurances, viz., \$2000 in the Queen's, \$2000 in the Scottish Commercial, \$900 in the Canada Farmers; also, a further assurance in the Queen's of \$2000, all without defendants' assent in writing. 15. To common counts, never indebted.

Issue.

The case was tried at the last Fall Assizes, at Guelph, before Galt, J., without a jury.

The fire took place on the 3rd August, 1877.

The facts are sufficiently stated in the judgment.

The learned Judge entered a verdict for the plaintiff for \$2,142.50, subject to several objections taken by defendants.

21st November, 1878, *Bethune*, Q. C., obtained a rule *nisi* to set aside the verdict and enter it for the defendants on the grounds:

1. That plaintiff did not disclose at the time of making his application the existence of the policy in the Provincial Insurance Company.

2. That there was a breach of warranty in not disclosing the fact that buildings were within 100 feet of the risk.

3. That there was no notice to defendants of the subsequent insurance in the Queen's Insurance Company.

December 6, 1878. *McCarthy*, Q. C., shewed cause.

The policy and condition must be read together, and the meaning is, that there must be no further insurance beyond the \$8000, of which plaintiff did apprise defendants. There was no bad faith, and the conditions have been substantially

complied with. They are to be read most strongly against the Company. He referred to *Bunyon* on Fire Insurance, 53, 114, 115; *May* on Insurance, 448; *Mercantile Marine Ins. Co. v. Titherington*, 5 B. & S. 765; *Fowkes v. Manchester &c., Co.*, 3 B. & S. 917; *Osser v. Provincial Ins. Co.*, 12 C. P. 133.

Bethune, Q. C., contra. The company can, on notice, cancel the contract. They bring themselves within the 8th statutory condition, which has been broken by the plaintiff. An endorsement on the policy of the then existing insurance is a compliance with the condition. This the plaintiff should have procured to be done, but he did not, and therefore the company is released from liability.

28th December, 1878. HAGARTY, C. J.—As to the first, objection, the learned Judge has not found specifically as to the Provincial Insurance.

The policy states generally, "Further insurance \$8000."

The interim receipt given to the plaintiff by Allan, defendants' agent at Orangeville, is dated 27th April, 1877, on property described in his application of 27th April, for one year.

Plaintiff stated that he had an insurance in the Provincial at the time of the application, but it was cancelled before the fire. A postal card was produced, which he sent to that company 29th June, directing the cancellation, to which they assented.

The policy was not produced by defendants, but plaintiff's application was. The application was for \$2000, from 1st August, 1876, to 1st August, 1877. Plaintiff's explanation seems to be that there was a mistake in the application produced as to the names of the companies in which he was insured. It stated \$8000 in all, which was correct, but \$2000, stated to be in Canada Fire and Marine, was wrong, as their policy did not cover *this* property. This was afterwards admitted as to the Canada Fire and Marine policy. This seems to be the explanation as to this Provincial policy. As to the second objection, the misdescription as to distance.

The application produced by defendants as that on which the policy was issued, is certainly wrong in the diagram at foot; but the plaintiff swears very positively that there was another application previously signed by him with the distances correctly given on a diagram at foot, after examining the distances: that some time after Allan, the agent, came to him and said the company had objected to the lowness of the rate, and asked him to sign another application, which he did in blank, leaving it to Allan to do as he pleased with, and he signed it merely for the purpose, as he understood, of having the rate increased. He paid the extra rate asked. He said there was no diagram filled in this second form that he signed.

The agent, Allan, corroborates plaintiff's statement that there was a prior application, and that the second differs from it. He is not very clear as to the state of the diagram in the first, but we cannot read his evidence without feeling that it substantially confirms plaintiff's account, and that the fair inference is, that the mistake in marking the position and distance in the second application was his mistake, and the first was correct.

The interim receipt, dated April 27, speaks of the application as being dated 27th, for one year. The application produced by defendant is for insurance from 28th April. This favours the assertion of there being two applications.

The learned Judge finds on this in favour of the plaintiff's contention, that the original application contained a diagram shewing the situation of the adjoining houses; that this was returned for some purpose to the local agent; that the latter induced plaintiff to sign another application in blank representing that the company required a higher rate; that he put the higher rate in the application, all the rest being in blank; that the agent, without reference to or knowledge of the plaintiff, filled up the blanks and made the diagram, acting strictly therein as defendants' agent.

A perusal of the evidence affords no ground for our questioning the correctness of this finding. We agree in it as the proper conclusion.

As to the third objection, on the insurance in the Queen Insurance Company. It appeared that the plaintiff had an insurance for \$2000 in the Western Insurance Company, and having agreed with the agent to cancel it, he arranged with him, being also agent for the Queen Company, to effect an insurance for the same sum with the latter. This was done, and on July 30, three days before the fire, plaintiff mailed a post card addressed to the manager of defendants' company, at Toronto; their head quarters were Hamilton, and they did not receive it till after the fire.

The learned Judge found that notice was not given; that at the time of the application notice was given that he had additional insurances to the extent of \$8000, and that the \$2000 in the Queen was in substitution of the \$2000 insured in the Western at the date of the application.

It is contended for the plaintiff that the substance of the contract has been complied with. The 8th statutory condition is: "The company is not liable for loss, if there is any prior insurance in any other company, unless the company's assent thereto appears herein, or is endorsed hereon; nor if any subsequent insurance is effected in any other company, unless and until the company assent thereto in writing signed by a duly authorized agent."

We must look on the substance of the contract, and of the statements and representations on which it is based, and when we find them made in good faith, and nothing concealed that was really material to be communicated, we must not look too closely at some unintentional error of form.

I cannot bring myself to hold that to an answer asking what other insurances affect the property, and in what companies, an unintentional error in the name of one company, where the true amount of insurance is given, shall vitiate the whole contract. So when the contract is based upon the statement that \$8000 of insurance is already on the property, and one policy of \$2000 is allowed to drop or be cancelled, and another to a like amount substituted therefor in another company, that the non-communication of the new insurance must necessarily destroy the contract.

The statutable condition, just cited, requires a subsequent insurance to be communicated. The meaning is plain, and the provision is most reasonable, that if the assured increase the insurance, the prior insurer must be consulted.

But I do not feel myself bound to the mere letter of the words used, when their spirit and substance point to a fairer and more liberal construction. The statutable condition was framed to prevent a substantial mischief—the construction asked by these defendants will simply cause it to work a great injustice in a case where no mischief was occasioned.

The man who pays his money on an interim receipt sees nothing of these conditions, and until he receives his policy has no means of seeing them. They are prepared by the underwriters, and the language of Sir A. Cockburn, in *Fowkes v. Manchester Ins. Co.*, 3 B. & S. 925, is in point: “In construing an instrument prepared by the company, and submitted by them to the party effecting the insurance, for his signature,” (or, as here, as the binding agreement,) “it ought to be read most strongly *contra proferentes*.”

I think the statutable condition has been complied with in substance and in spirit.

We discharge the rule, and the verdict stands for the plaintiff.

ARMOUR and CAMERON, J.J., concurred, CAMERON, J., however stating that if he did not consider himself concluded by the decision of the Court of Common Pleas in a similar case, *Parsons v. Victoria Montreal Fire Ins. Co.*, 29 C. P. 22, he should have felt great doubt in holding that a subsequent insurance not notified, would not avoid the policy, though the subsequent insurance did not increase the whole amount of insurance beyond the amount notified, his idea being, that a change in the insurance should be notified; but that on this point only had he any doubt.

Rule discharged.

HUGHES ET AL. V. BROOKE.

*Devise in trust—Refusal to accept—Nonjoinder—Continuance of tenancy—
Right of devisees in trust to recover rent.*

One of the devisees in trust under a will refused to accept the trust: *Held*, that he was not a necessary party plaintiff in an action for rent of the premises devised, although his formal renunciation in writing was not made until after the rent in question had accrued due.

Defendant was tenant from year to year of the premises in respect of which the rent in question was sought to be recovered, being for three quarters accruing due after the death of the lessor. No notice to quit was given, nor was the tenancy determined by the consent of the parties entitled; on the contrary, the defendant recognized the continuance of the tenancy by the payment of rent falling due after the lessor's death: *Held*, that the tenancy was not determined by the death of the lessor, and that the plaintiffs, the devisees in trust under the lessor's will, were entitled to recover the three quarters' rent in use and occupation:

Heid, also, that it was no answer for the defendant that he had ceased to occupy, for he still held by the plaintiffs' permission and might have occupied had he so pleased.

Declaration:

1st count: For that the plaintiffs let to the defendant a house on King street west, in the city of Toronto, at four hundred dollars a year, payable quarterly, of which rent three quarters were due and unpaid.

2nd count: For money payable by the defendant to the plaintiffs for the defendant's use by the plaintiffs' permission of messuages and land of the plaintiffs.

Pleas:

To 1st count. That the plaintiffs did not let to the defendant the said house upon the terms alleged.

To 2nd count. Never indebted. And to the whole declaration, payment.

The cause was tried at the last Fall Assizes for the city of Toronto, before Patterson, J. A., without a jury.

It was shewn at the trial that Anne Hughes, the owner of the premises, in respect of the rent of which this action was brought, died on the 24th August, 1877, and by her will devised the said premises to her executors, the plaintiffs Hughes and one Smith, in trust for certain purposes therein set forth: that the plaintiffs Hughes accepted the trust, but that Smith refused to do so: that by an instrument dated

June 21st, 1878, the plaintiffs Hughes, under a power contained in the will, appointed the plaintiff McCrosson their co-trustee in the room of Smith: that Anne Hughes let the said premises to the defendant in 1873, to hold from the 1st of March, of that year, at the yearly rent of four hundred dollars, payable quarterly on the first days of June, September, December, and March, in each year: that at the time of her death he was her tenant, from year to year, of the said premises, on the said terms: that he continued to occupy them until some time in August or September, 1877: that in February, 1878, he sent the key to the plaintiffs Hughes, who refused to receive it, and it was brought back: that on August 28th, 1877, he paid to the plaintiffs Hughes \$400, which paid the rent due in respect of the premises up to and including the first day of March, 1877, and that on the 15th January, 1878, he paid to the same plaintiffs \$200, which paid the rent due up to and including the first day of September, 1877: that the rent sued for was that falling due on the first day of December, 1877, and on the first days of March and June, 1878, and that no notice determining the tenancy had been given by any party.

It was objected at the close of the case that McCrosson was improperly joined as a plaintiff, and the learned Judge allowed his name to be struck out, in case the plaintiffs, without him, should be entitled to recover, otherwise his name to remain for the purpose of his being liable for costs. It was then objected that Smith ought to have been joined as a plaintiff, and that as the plaintiffs were assignees of the reversion there was no privity of contract between them and defendant, only privity of estate; and therefore defendant had a right to leave, and would not be liable on either count for rent after he left, notwithstanding his having paid two quarters' rent after testatrix's death.

The learned Judge overruled these objections, and entered a verdict for the plaintiffs Hughes, for \$300, with leave to defendant to move as advised, the Court to draw inferences of fact as a jury.

On 20th November, 1878, *McMichael*, Q. C., obtained a rule *nisi* to set aside the verdict, and enter a nonsuit or verdict for defendant pursuant to leave, or for a new trial on the law and evidence, there being no evidence of a demise by plaintiffs to defendant, plaintiffs, having no right, as devisees and assignees of the reversion, to sue upon any contract made with the original lessor, Mrs. Hughes: that during all the time defendant was in possession after the death of Mrs. Hughes, if holding under any contract of tenancy, it must have been with the three original devisees, as the renunciation of the trustee Smith did not take place till long after defendant left the premises, and Smith should have been a party: that the fact that defendant was in possession for some months, for which time he paid, cannot make him a tenant under a contract upon which he could be sued after he left the premises, and if no contract, he could not be sued as for use and occupation, for the time he was not in possession after he had left the premises.

Read, Q. C., shewed cause.

The testatrix gave power to her trustees to appoint another trustee in case any one of them refused to act, but did not in the same terms give such power to a majority of them. The refusal of a trustee to act is just the same as if he had never been named trustee: *Adams v. Taunton*, 5 Madd. 435; *Smith v. Wheeler*, 1 Vent. 128; *Niclosson v. Wordworth*, 2 Swans. 365. The plaintiffs Patrick and Bernard Hughes had then the power to appoint McCrosson their co-trustee, but McCrosson was not appointed till after the rent sued for had accrued. Striking his name out as plaintiff places the record in proper shape. The rent had accrued, and Patrick and Bernard Hughes had a right to sue for it, the former appointee, Smith, having refused to act as trustee, and McCrosson, although not appointed when the rent accrued, had a right also to sue. The payment of rent to them after the testatrix's death, was a continuation of the tenancy on the same terms as the tenancy subsisting under the testatrix.

The plaintiffs were also entitled to recover under the count for use and occupation. The rent sued for is for the three quarters from 1st September, 1877, to 1st June, 1878. The defendant in February, 1878, sent the key of the dwelling to the plaintiffs, having removed to another house, but the plaintiffs refused to accept the key. There was no notice of intention to leave given by the defendant, and no surrender of the premises in law or in fact. The defendant is not in actual but constructive possession, and so the plaintiffs are entitled to recover for use and occupation: *Pinero v. Judson*, 6 Bing. 206; *Sullivan v. Jones*, 3 C. & P. 579; *Izon v. Gorton*, 5 Bing. N. C. 501.

McMichael, Q. C., contra. The original lease was from year to year with the lessor, Mrs. Hughes. This term was not put an end to by notice, and was therefore in full existence as a contract at the time of the death of Mrs. Hughes. The estate passed to the plaintiffs as devisees, and they thereby became the assignees of the reversion; but, although this created privity of estate, it did not create privity of contract: the Statute of Henry VIII. only applies to leases under seal, and as the term was still in existence, the privity of contract was between the defendant and the heir, and not the plaintiffs: *Standen v. Christmas*, 10 Q. B. 135, 138. While this contract was in existence, all payments of rent must be in respect of the lease still in existence; and no new contract with the plaintiffs can be inferred from payment of rent, nor would payment of rent under that contract be inferred as attornment; in fact, there could be no attornment to them, for they were not assignees of the term. If anything, it could only be the creation of a new term, which could not be while the original contract was in existence; and payment of rent to a stranger does not create a term. Then, although, while defendant was in occupation they could distrain, they could not hold him as in occupation by virtue of the contract, when with them there was no contract.

28th December, 1878. ARMOUR, J.—We think there is nothing in the objection that Smith was not made a

plaintiff. The evidence shews that he always refused to accept the trust, although his formal renunciation in writing was not made till after the rent sued for accrued due: *Thomson v. Leach*, 2 Vent. 198; *Townson v. Tickell*, 3 B. & Ald. 31.

We think the rent sued for recoverable by the plaintiffs Hughes from the defendant, under the count for use and occupation.

The tenancy of the defendant from year to year, subsisting at the time of the death of Anne Hughes, was not put an end to by her death, but would be held to continue until determined by the consent of the parties entitled, or by a regular notice to quit. No such consent or notice was ever given, but, on the contrary, the defendant expressly recognized the same tenancy as still subsisting, by paying, in January, 1878, the rent falling due on September 1, 1877.

It is no answer for the defendant to say that he ceased to occupy, for he still held by the permission of the plaintiffs, and might have occupied if he thought fit: see *Burrows v. Graden*, 1 D. & L., 213; *Lumley v. Hodgson*, 16 East 99; *Buckworth v. Simpson*, 1 C. M. & R. 834.

We think the rule should be discharged.

HAGARTY, C. J.—I agree in the result, on this short ground, that I infer from the evidence that defendant was a yearly tenant of Mrs. Hughes, paying rent quarterly; that after her decease, in April, 1877, he continued in occupation, and paid rent on the same terms for two quarters falling due after her decease. I therefore think he continued as yearly tenant to the present plaintiffs, who are the devisees. I think the striking out of McCrosson's name removes any technical objection.

On the main point, as to a yearly tenancy continuing, I refer to *Kelly v. Patterson*, L. R., 9 C. P. 686; *Humphries v. Franks*, 18 C. B. 323; *Buckworth v. Simpson*, 1 C. M. & R., at p. 844, per Parke, B.

CAMERON, J., took no part in the judgment, having been concerned in the case at the Bar.

Rule discharged.

JOHN HALDAN, PLAINTIFF, V. MARGARET BEATTY, DEFENDANT

AND

JOHN O'DONOHUE AND JAMES WILSON, CLAIMANTS,

AND

IN CHANCERY.

BETWEEN MARY ELLEN WILSON, PLAINTIFF,

AND

CATHERINE WILSON, MARGARET BEATTY, AND CHARLES
BEATTY, DEFENDANTS.

AND

JOHN O'DONOHUE AND JAMES WILSON, CLAIMANTS.

*Interpleader—Common law and Chancery writs—Jurisdiction—Estoppel—
R. S. O. ch. 54, secs. 11, 12, 13.*

After the issue of an interpleader summons founded on two writs of *fi. fa.* issued respectively out of this Court and the Court of Chancery, the writ from this Court was set aside: *Held*, that the Judge in Chambers had jurisdiction, notwithstanding, to continue the proceedings and make the interpleader order as to the latter writ; but *quære*, even if the want of jurisdiction had been clear, whether a party could avail himself of it after having agreed to the order, accepted the issue, defended it at the trial, and moved against the verdict, &c.

THE sheriff of the county of York having had delivered to him to be executed a writ of *fi. fa.* against the goods of the defendant in the suit firstly above mentioned, and also a writ of *fi. fa.* against the goods of the defendant in the suit secondly above mentioned, and having seized, under and by virtue of the said writs, certain goods and chattels, and the same having been claimed by the said John O'Donohue and James Wilson under chattel mortgages held by them respectively, on the 3rd day of May, 1877, applied to the Judge in Chambers for and obtained the usual interpleader summons, entitled as above, calling upon the plaintiffs and claimants to shew cause why they should not appear and state the nature and particulars of their respective claims, and maintain or relinquish the same, and abide by such order as might be made therein. On the same

day the defendant in the suit firstly above mentioned obtained a summons to set aside the writ of *fi. fa.* issued therein. Both the said summonses were returnable on the following day, when all parties attended in obedience thereto, and the same were enlarged until the next following day, when the last mentioned summons was argued and judgment thereon was reserved, and the first mentioned summons was enlarged until the last mentioned summons should be disposed of.

On the 7th of May, 1877, an order was made on the last mentioned summons, setting aside the said writ, and on the 9th of May, 1877, an interpleader order was made upon the first mentioned summons, entitled as above, by which, after stating therein that the writ of *fi. fa.* in the first above named suit had been set aside, and that the claim of James Wilson was not disputed, an issue was directed as to the claim of the said John O'Donohoe, in which he was to be plaintiff and the said Mary Ellen Wilson was to be defendant, and the usual directions were given respecting the same. The issue so directed was tried at the assizes at the city of Toronto, in June, 1877, when a verdict was rendered for the claimant, and a rule was subsequently obtained in this Court to enter the verdict for the defendant, which rule was afterwards discharged (a). Thereafter, on the 3rd of January, 1878, a summons was obtained by the said O'Donohoe calling upon the said Mary Ellen Wilson to shew cause why the money, the proceeds of the sale of the goods seized and then in the sheriff's hands, should not be paid over to him, and why she should not pay all the costs of the interpleader proceedings; and on the following day an order was made directing the sheriff to pay over to the said O'Donohoe the said money, and directing the payment by the said Mary Ellen Wilson to the said O'Donohoe of all costs, including the costs reserved by the said interpleader, the costs of the said issue, the costs of the sheriff and of that application.

The said costs were subsequently taxed by the proper

officer at the sum of \$88.35, and what purported to be a judgment upon the said issue was signed on the fifth day of January, 1878; and on the 24th day of January, 1878, a writ of *fiери facias* against the goods of the said Mary Ellen Wilson was issued thereon for the said costs.

On the first day of February, 1878, the said Mary Ellen Wilson, on the affidavit of her attorney, verifying a copy of the said judgment, and of the said writ of *fiери facias*, and affirming that the claimant never served upon the execution creditor, nor upon her attorney, any notice of the taxation and amount of said costs, in pursuance of the requirements of the statute in that behalf, applied for and obtained a summons calling upon the said O'Donohoe to shew cause why the said judgment, and the writ of *fiери facias* issued thereon, and an order for the examination of the said Mary Ellen Wilson thereon, should not be set aside for irregularity, with costs, on numerous grounds, being in effect that the said notice of taxation and amount of said costs had not been served, and that the said judgment was not a proper "entry of record," within the R. S. O., ch. 54, s. 19, and that the said writ was defective in form; and thereupon, on the 7th day of February, 1878, an order was made setting aside the order for examination, and directing the amendment of the said judgment, or "entry of record," and writ. to meet the defects alleged therein.

In Hilary term last, *Donovan*, for Mary Ellen Wilson, obtained a rule *nisi* calling upon the said O'Donohoe to shew cause why the interpleader order of 9th May previously; the issue tried; the rule respecting the verdict on such issue; the order of 4th January, 1878; the pretended record of proceedings entered in this Court on 5th January, 1878; the *fi. fa.* issued thereon; the order of 7th February, 1878; and all other proceedings respecting the *fi. fa.* goods of said Mary Ellen Wilson, issued out of the Court of Chancery in the above suit, wherein she was plaintiff, should not be set aside with costs, as being null and void.

1. Because on 3rd May, 1877, the sheriff of York had no valid *fi. fa.* in the above suit and action in his hands, save

the writ of *fi. fa.* goods of Mary Ellen Wilson, in said Chancery suit of *Wilson v. Wilson*, and the claim of said claimant John O'Donohoe to the goods could only be adjudicated upon by the Court of Chancery, which Court alone had cognizance of said suit of *Wilson v. Wilson*, and the said sheriff should have applied to the Court of Chancery and not to this Court for relief. 2. Because the authority of the above-named John Haldan as administrator was determined on 16th March, 1877, by proof of the will of Thomas Wilson, and the granting of probate to Charles Beatty and James Wilson, the executors, and the said action of *Haldan v. Beatty* on that day abated; and the said Haldan had no right to issue a *fi. fa.* goods therein, and the said writ was irregular and void, and any seizure by said sheriff thereunder was of no effect; and the judgment in said action having been released on the said 3rd May, 1877, with the knowledge of said claimant, said *fi. fa.* could not authorize said sheriff to apply to this Court for relief, and said claimant ought to have so informed this Court or said sheriff. 3. Because the *fi. fa.* issued in said action of *Haldan v. Beatty* having been set aside on 7th May, 1877, this Court had no jurisdiction to make the order of 9th May, 1877, requiring the plaintiff in said Chancery suit to interplead with said claimant in this Court respecting the goods seized by virtue of said *fi. fa.* in said suit of *Wilson v. Wilson*, there being on the said 9th of May no *fi. fa.* issued from this Court in respect of any action or proceeding in this Court, which alone could give this Court jurisdiction. 4. Because the above-named John Haldan not having appeared on the interpleader summons, and not asserting any claim to the goods seized, was not a party to the interpleader order of 9th May, 1877, and his name, and the style of cause in said action of *Haldan v. Beatty*, ought not to have been retained upon said order; and the only cause in which an interpleader took place was in the Chancery suit of *Wilson v. Wilson*, of which this Court had no cognizance, and wherein it could not adjudicate. 5. Because the goods

seized by the sheriff of York belonged jointly to Margaret Beatty and Catharine Wilson, of which the claimant was well aware, the rights of the defendant Margaret Beatty therein being equitable, and on that account could not have been adjudicated upon in this Court. 6. Because there was no record of the suit of *Wilson v. Wilson*, in this Court, this Court had no cognizance thereof, and the proceedings had herein could not be entered in this Court for default of such record. 7. Because the entry of the proceedings in interpleader herein were a nullity, and did not comply with the requirements in that behalf. 8. Because no notice of taxation, and the amount thereof, was given, as required by the statute in that behalf, and said pretended record of proceedings was entered fifteen days too soon. 9. Because the said pretended entry of proceedings of record was in fact a pretended entry of judgment on a feigned issue, and was not authorized under the statute in that behalf. 10. Because the writ of *fi. fa.* issued by virtue of said pretended record, or judgment, did not follow said record or judgment, and was wholly unauthorized and void. 11. Because the Court had no power to order an entry *nunc pro tunc* of proceedings on record, and the order in that behalf of 7th February, 1878, was wrong, and not warranted by the statute respecting the entry of interpleader proceedings of record.

In Easter Term last, upon objection taken, this rule was allowed to be amended, upon payment of costs, by calling upon Wilson and the sheriff, in addition to O'Donohoe, to shew cause.

December 2, 1878. *F. Osler* for the sheriff. It is admitted that the order was made without authority, yet no motion is made against it till Hilary Term, 1878, a delay that has clearly cured all objection to the order, or at any rate waived it. He cited *R. S., O., ch. 54, s. 13*; *Richardson v. Shaw*, 6 P. R. 296; *Hemmingway v. Buffalo and Lake Huron R. W. Co.*, 22 U. C. R. 562; *Re Denton v. Marshall*, 1 H. & C. 654.

Campbell, for the claimant James Wilson, objected that O'Donohoe had not been properly brought before the Court, referring to sec. 12 R. S. O., ch. 54. The execution creditor is estopped after the lapse of three terms. *Harrison v. Wright*, 13 M. & W. 816, shews that the order, if by consent, is binding, though the Judge had no jurisdiction. If a nullity, there is no need to move against it. As to irregularities, the Court will not interfere on the ground that there were such in the entry of the judgment, and the Clerk of the Crown and Pleas gave leave to amend these, and his order should have been appealed against in the ordinary way.

Donovan for the execution plaintiff, Mary E. Wilson. It is a question of jurisdiction. R. S. O., ch. 54, sec. 10. The Court never had jurisdiction, and if so then the whole proceeding is a nullity. The interpleader is a part of the original suit, not an independent one. There is no question of assent, for if there was no jurisdiction there could be no assent. [ARMOUR, J.—Your difficulty is, that there was jurisdiction at the time of the granting of the summons.] It is the writ not the judgment which gives jurisdiction. The only writ was that in *Wilson v. Wilson* in the Chancery suit, and that Court alone had jurisdiction. The Chambers order was void, because there could be no amendment, and the Court will set aside proceedings which are void. [The Chief Justice referred to *McLaughlin v. McLaughlin*, 15 C. P. 182.] He also cited *Wilson v. Thorpe*, 6 M. & W. 723; *Lawrence v. Wilcock*, 11 A. & E. 941; *Jacquet v. Bower*, 7 Dowl. 331; *Macnamara on Nullities*, p. 31; *Chambers v. Coleman*, 9 Dowl. 588; *Garrett v. Hooper*, 1 Dowl. 28. On the question of assent: *Macnamara on Nullities*, 10. As to the form of entering judgment: *Mortimer v. Piggott*, 2 Dowl. 5. He also referred to *Doe Turnbull v. Brown*, 5 B. & C. 384. In an interpleader, the Court cannot direct an entry to be made *nunc pro tunc*: *Lambirth v. Barrington*, 4 Dowl. 126; *Macnamara*, 81, 82; *Dickinson v. Eyre*, 7 Dowl. 721.

ARMOUR, J.—The writ of *fi. fa.* issued in the first mentioned suit was issued upon a judgment regularly recovered

and was a valid writ, and if irregularly and improperly issued was in no wise void, and it is not shewn that the sheriff had any knowledge or notice of any irregularity or impropriety, (if such there was) in the issue thereof; so that at the time the sheriff made the application for and obtained the summons for an interpleader herein, both the said writs were in his hands in full force, and the same goods had been seized by him under both writs, and his application was therefore properly made in this Court, and the Judge in Chambers had full power and authority to grant the said summons.

R. S. ch. 54, sec. 11, enacts "In case the sheriff has more than one writ at the suit or instance of different persons against the same property, it shall not be necessary for the sheriff to make a separate application on each writ or in each cause, but he may make one application, and may make all the persons who are execution creditors parties to said application, and the Court or Judge before whom the application is made shall take such proceedings and make such order thereon and therein as if a separate application had been made upon and in respect of each writ."

And section 12 provides, that "in case there are writs from several Courts, including one or more of the Superior Courts, or two or more County Courts, against the same goods, and whether at the suit or instance of the same plaintiff, or of different plaintiffs, the application for such interpleader shall be made to the Superior Court, or to one of said Superior Courts, or to one of the Judges thereof; and such Court or Judge shall dispose of the whole matter as if all the writs against the goods had been issued from the said Court; and in such case the County Court or Division Court shall have no cognizance of or jurisdiction whatever in the matter."

It was contended, however, that, admitting the Judge in Chambers had jurisdiction to grant the summons, yet, inasmuch as after granting the summons, and before making the order, the writ of *fieri facias* in the first named suit, the existence of which in the Sheriff's hands at the time

the summons was granted alone gave this Court jurisdiction, was set aside, this Court ceased to have any jurisdiction, and the Judge in Chambers had thereupon no power to make the order. We cannot adopt this view of the law.

We think that this Court having had jurisdiction to receive the application and grant the summons, and being, as it were, seised of the subject matter, did not cease to have jurisdiction by what afterwards occurred, viz., the setting aside of the writ, but that its jurisdiction continued until the whole matter was disposed of. See *Ex parte Cowan*, 3 B. & Ald. 123.

Had we come to a different conclusion, we should have had to consider whether this application to set aside the order was not too late: *Orchard v. Moxsy*, 1 E. & B. 206; *Collins v. Johnson*, 16 C. B. 588; *Hemmingway v. Buffalo & Lake Huron R. W. Co.*, 22 U. C. R. 562.

On referring to the Judge in Chambers, we find that it clearly appeared to him, on the argument of the summons of the 1st of February, 1878, that the attorney for Mary Ellen Wilson had notice of the taxation and amount of costs more than fifteen days before the issue of the writ therein referred to, and we think the order of the 7th day of February was rightly made.

We think that all the proceedings attacked by this application were duly authorized, and rightly had and taken in this Court, and that the rule must be discharged with costs

HAGARTY, C. J.—I am also of opinion that the rule should be discharged.

It is a case in which nothing but the most overwhelming sense of want of jurisdiction should induce us to accede to this application. As there were suits in several Courts the parties were legally brought, on the sheriff's application, before the Judge of one of these Courts, under sec. 12, who has power to dispose of the whole matter as if all in his Court.

Sec. 13 then empowers the Judge to make such order with respect to staying proceedings on the several writs, or

with respect to directing a sale of the goods or property in question, as may be necessary, and with respect to the final disposition or order to be made as to the goods or the proceeds thereof, and in all other matters whatsoever, as fully as if all the writs had been issued from the said Court.

Sec. 10 gives very full powers to the Judge for the adjustment of claims and to make such rules and orders as appear just. It seems to me that all the parties being lawfully before the Court and being heard by the Judge, the result of his enquiry may be, that one plaintiff may agree to abandon his whole claim against the defendant, or the latter may produce some receipt or writing by which it may appear that in reality the whole claim is paid or at an end.

It may then be admitted and agreed that such claim be wholly given up and the suit withdrawn. I see no reason why the fact of the particular suit which gave the Judge jurisdiction over the suits in the other Courts being thus arranged or withdrawn at the hearing, must necessarily divest the Judge of all jurisdiction to direct the remaining parties and claimants, with their apparent full consent, to proceed to the trial of an interpleader issue.

We are told by recent legislation that the Courts are to be ancillary to each other. I think it would be clearly within the spirit of such legislation that where one Court has lawfully initiated certain proceedings and entered upon what, in some cases, might be an expensive enquiry into the position and claims of several parties and claimants in different Courts, that such Court should not be debarred from making the order for the final adjustment of claims because one of those claims, even when such claim was the foundation of its jurisdiction, was found to have ceased to exist between the summons and the order made thereon, no party objecting, and possibly the very enquiry before the Judge having elicited the information or evidence which disposed of such settled or abandoned claim.

If the want of jurisdiction had been clear, I think, with my brother Armour, that a very serious question would

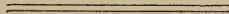
then have to be determined, viz., whether parties can, at any time and under all circumstances, claim the right to ask a Court to stultify all its proceedings taken, not only without objection but with the fullest assent of the parties now seeking to avoid them.

The applicant here agreed to the rule now impeached, accepted the issue under it, became a party to the new suit, defended it at trial, moved for new trial, &c.

Nothing but the most undoubted case of right should induce us to interfere under such extraordinary circumstances.

CAMERON, J., concurred.

Rule discharged.



A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF QUEEN'S BENCH,

FROM HILARY TERM, 41 VICTORIA, TO MICHAELMAS TERM, 42 VICTORIA.

AMENDMENT.

Ejectment—Adding co-plaintiff—New trial for discovery of new evidence.]—In ejectment the plaintiff claimed as grantee of one S., but the conveyance was not executed until after the commencement of the suit. A verdict having been entered for the plaintiff, the plaintiff, on shewing cause to a rule for a new trial, filed the consent of S., who at the commencement of the suit was a mere bare trustee for the plaintiff, to be added as a plaintiff, and the Court allowed the amendment.

A new trial was refused on the ground of the discovery of new evidence, when it was not shewn that the evidence could not have been procured before the trial; and when such evidence went to prove, not that defendant had any title, which was in no way shewn, but that a third person, with whom he had no privity, was entitled to a moiety of the land.—*White v. McKay et al.*, 226.

Of conviction imposing unauthorized sentence, on motion to quash.]—See ULTRA VIRES.

See CRIMINAL LAW, 1.

See INSURANCE, 3.

APPEAL.

Ca. sa.—Order for—Reviewal of in Term—Application for discharge from custody—Property—Meaning of.]—*Held*, on an application by way of appeal from a Judge's order for the issue of a writ of *ca. sa.*, that the Court in term has power to review such order; but *semble* that an application made after the lapse of the succeeding term is too late.

Held, on the merits, that the order in this case ought not to be interfered with, as it sufficiently appeared from the affidavits before the Judge that the defendant had parted with the property or had made some secret

or fraudulent disposal thereof to prevent its being taken in execution; and *semble*, that the affidavits also shewed that unless immediately apprehended defendant was about to quit Canada with intent to defraud his creditors.

Held, also, that "property" in Consol. Stat. U. C. ch. 24, sec. 12, refers to personal as well as real property.

Held, also, that an application to discharge a defendant from custody under section 31 of the Act, lies only when the arrest is under mesne process, and not where he is in custody under final process.—*Kidd v. O'Connor*, 193.

See ARBITRATION AND AWARD, 3.

ARBITRATION AND AWARD.

1. *Award*—*Rev. Stat. O. ch. 174, sec. 456*—*Delay in moving against.*]—*Held*, that an application to set aside an award made under sec. 456, R. S. O., ch. 174, and published before Trinity Term, 1877, was too late on the 26th Nov. following, though the full Court did not sit in Trinity Term.

Such an award having been set aside by a single Judge, on motion made after Trinity Term, the Court gave effect to this objection though first taken on appeal from the rule setting aside the award.—*Re Moyle and the City of Kingston*, 307.

2. *Reference by consent*—*Time for moving against.*]—An award made under sec. 160 Con. Stat. U. C. ch. 22, before Trinity Term, must be moved against within the first four days of that term, even though the full Court may not sit, as the motion can be made to a single Judge within the same period.

Held, also, that the reference in this case could not be treated by defendant as compulsory, being expressed to be by consent in the order of reference, which on his motion had been made a rule of Court; and that if not by consent, he should first have had the order amended.—*Wilson v. Richardson*, 365.

3. *Award*—*Appeal under 39 Vic. ch. 28, sec. 7, O.—R. S. O., ch. 50, sec. 192*—41 *Vic. ch. 6, sec. 3, O.—Construction.*]—Sec. 3 of 41 *Vic. ch. 6, O.*, declares that the Legislature is not by that Act or the 40 *Vic. ch. 6, O.*, to be deemed to have adopted the construction which may by judicial construction or otherwise have been placed upon the language of any statutes included amongst the Revised Statutes.

Held, notwithstanding this enactment, that sec. 192 of ch. 50, R. S. O., being not only in words but in effect the same as sec. 7 of 39 *Vic. ch. 28, O.*, repealed, but reenacted by it, must receive the same construction as was placed upon the repealed enactment by the *Manufacturers and Merchants Fire Ins. Co. v. Atwood*, 28 C. P. 21, and therefore that there could be no re-hearing by the Court by way of appeal from the decision on an award made by a single Judge under the repealed enactment.—*Crain v. Trustees of the Collegiate Institute of the City of Ottawa*, 498.

ARSON.

See INSURANCE, 1.

ASSESSMENT.

Alteration—*Validity of*—*Court of Revision*—*Sittings of*—*Tender*—*Evidence.*]—The plaintiffs were entered

upon the assessment roll for the year 1877, which was duly completed and delivered to the clerk of the municipality, for the total aggregate value of all their property and income at \$8,000, and on the 28th of April were served with the notice in accordance with 32 Vic. ch. 36, sec. 48, O., against which they did not appeal. At the first meeting of the Court of Revision on the 19th of May, a resolution was passed instructing the clerk to notify the plaintiffs, amongst others, that they were assessed too low, but it did not appear that plaintiffs were ever so notified. On May 26 the Court of Revision again met, when a resolution was passed that the plaintiff's assessment be laid over until the next meeting. After this second meeting the assessor, of his own motion, and without any authority therefor, altered the assessment to \$10,000, and delivered to the plaintiffs a second notice notifying them thereof. The plaintiffs' clerk happened to be present at the second meeting and heard plaintiffs' names mentioned, and on afterwards receiving the notice, supposed the matter was settled and thought no more about it. The Court of Revision, however, held a third meeting on June 2nd, and without any notice to plaintiffs, acting apparently under the belief that without such notice or an appeal by any one, they had authority to do so, raised the assessment to \$12,000.

Held, that under the circumstances neither the assessor nor the Court had any authority to alter the assessment roll, and therefore the increase was illegal and void.

By 37 Vic. ch. 19, sec. 11, O, the first sittings of the Court of Revision is directed to be held ten days after the time within which notice of appeal may be given; and section 12

provides that the notice must be given within fourteen days after 1st May, &c. *Held*, therefore, that the sittings on the 19th of May were illegal.

Held, also, that it was not essential that there should be a plea of tender of the proper sum, and evidence in support thereof; but even, if necessary, there was such plea and evidence.—*Tobey et al. v. Wilson et al.*, 230.

ASSIGNEE.

In Insolvency] — See CHATTEL MORTGAGE.

See DISTRESS, 2.

ATTACHMENT.

Examination of party to cause—Refusal to answer—Motion for attachment—Certificate of examination—Special report.]—In support of an application for a writ of attachment against a party for contempt in refusing to answer certain questions on an examination under the C. L. P. Act, R. S. O. ch. 50, or for his attendance to be examined at his own expense. *Semble*, that the copy produced of such examination should be a copy thereof certified under the hand of the examiner, and that a sworn copy is not sufficient.

Semble, also, that before a witness can be rendered liable for contempt, the examiner must express his opinion as to the propriety of the witness's answering.

Under the Act it is provided: 1. If the party under examination demurs or objects to any question, such question and objection shall be taken down by the examiner and transmit-

ted to the Court, who shall decide thereon. 2. If either party is dissatisfied with the conduct of any witness, he may require the examiner to make a special report to the Court, who shall make such order upon such report as justice may require. In this case neither of the above modes was adopted, and the writ of attachment was therefore refused.

Held, also, that in the absence of such special report no order can be made for the witness attending to be re-examined at his own expense.—*Clark v. Allen*, 242.

Supersedes an execution against an insolvent.—See CHATTEL MORTGAGE.

AWARD.

See ARBITRATION AND AWARD, 1,2,3.

BARRISTER.

Barrister and attorney—Security for future services—Validity of—Overdue note—Fraud.—The plaintiff, who was a barrister and attorney, having refused to defend one H., who had been arrested for embezzlement, in that and other matters, until satisfied as to his remuneration, agreed to do so on H.'s wife endorsing over to him an overdue note which H. had procured defendants to make to her, and on F., one of the defendants, admitting it to be all right and agreeing to pay it to plaintiff. Subsequently, and after plaintiff had performed some trifling services for H., defendants discovered that no value had been given for the note, but that it had been obtained by H.'s fraud, of which, however, the wife was ignorant, and they then notified the plaintiff that they did not acknow-

ledge any liability thereon, and would not pay it. In an action by plaintiff against defendants on the note :

Held, that he could not recover, for that whether the note was received by plaintiff as security or as a payment in full for future services, the transaction was void as against public policy ; and that this was a good defence available to the defendants under the plea that the plaintiff was not the lawful holder.

Held, also, that the plaintiff having become the holder after maturity could stand in no better position than the wife, who was bound by the fraud of her husband who acted as her agent in procuring the note to be made to her.—*Robertson v. Furness et al.*, 143.

See COUNSEL FEES.

BILLS AND NOTES.

1. *Promissory notes—American Currency—Evidence of experts—Stamps—Double duty—Cancellation—Knowledge, when first acquired.*—*Held*, that a president of a bank, in a foreign country, whose business it is to deal with money therein, though not a lawyer, is an admissible witness to prove the law of that country, as to what is money there.

Held, also, that a promissory note made in Canada and payable in the United States, and in the currency thereof, without the words "and not otherwise or elsewhere," was a good promissory note, for that it was payable generally and might be sued on here.—*Bettis v. Weller*, 30 U. C. R. 23, overruled, and *Greenwood v. Foley*, 22 C. P. 352, followed.

Two promissory notes made in Canada, payable in the United States, were insufficiently stamped ; on one

the stamps were insufficient in amount, and the stamps had not been cancelled on either when the note was made. In June, the notes were placed for collection in the hands of plaintiffs' attorney in Canada, who, on August 29th, wrote to the plaintiffs, a bank in the United States, who were the holders thereof and ignorant of our stamp laws, and requesting them to affix double duty, which was immediately done, and the stamps cancelled by writing thereon the date of cancellation and the initials of the cashier, with his description of office as such.

Held, that the plaintiffs first acquired knowledge of the defective stamping on the receipt of the letter of August 29th: that the knowledge of the attorney in June, if then acquired, was not the knowledge of the plaintiffs; and that the cancellation by the cashier was sufficient, though the initials of the bank were not used, nor its corporate seal.

Semble, that the knowledge intended by the statute is actual knowledge, and that constructive notice will not suffice.—*Waterous v. Montgomery*, 36 U. C. R. I, remarked upon.—*The Third National Bank of Chicago v. Cosby et al.*, 58.

2. *Promissory note — Indorser—Alteration without notice—Promise to pay.*—After the making of a promissory note, it was altered by the maker as to the time of payment, without the consent of the endorser, who, however, but without knowledge of the alteration, promised to pay it; *Held*, in an action against the indorser, that the alteration having been made without his authority rendered the note void, and that no subsequent promise by him to pay could have the effect of ratifying it.

Held, also, that without actual

knowledge of the alteration the promise to pay amounted to nothing, the means of knowledge alone being insufficient.—*Westloh v. Brown*, 402.

3. *Promissory note—Accommodation indorser—Innocent holder.*—Defendant B. indorsed a promissory note made by defendant C., for the purpose of renewing a former note also endorsed by him for C.'s accommodation. C. instead of retiring the former note, parted with the renewal to plaintiff, a creditor of his, who was at the time aware that B. had been assisting C. in money matters. After the note had been indorsed by C. to plaintiff, C. procured B.'s indorsement of another note at a shorter date, stating that the holders of the original note would not accept the first renewal, and promising to return the latter with the original note. It was found that there was no bad faith on plaintiff's part in taking the note: *Held*, that C. had B.'s authority to indorse the note to the plaintiff, and that the only notice the law would impute to plaintiff taking the note from C., the maker, was that B. was surety for him, and perhaps an indorser without value for his accommodation; and therefore *Held*, that plaintiff was entitled to recover against B.—*Cross v. Currie et al.*, 599.

Overdue note.—See BARRISTER.

Liability of married woman as indorser.—See MARRIED WOMAN, 1.

Improperly stamped.—See CHATTEL MORTGAGE.

CA. SA.

Right of Court to review order for.—See APPEAL.

CHATTEL MORTGAGE.

Chattel mortgage to secure endorser of notes—Assignee in insolvency—Notes improperly stamped—Execution—Attachment.—*Held*, 1. That a chattel mortgage, given to secure the mortgagee against his indorsements for a mortgagor, must shew on its face that the notes endorsed, or any renewals thereof, will fall due within the year, otherwise the mortgage will be void against creditors or purchasers, but not against the assignee in insolvency.

2. That notes not properly stamped, taken by a bank, are invalid if the bank does not attach double stamps and properly cancel the same when it first receives the notes, and will not support a chattel mortgage.

3. That an execution against an insolvent debtor is superseded by an attachment in insolvency, and a chattel mortgage void against an execution creditor, but good against an assignee in insolvency, prevails over an execution so superseded.—*Ontario Bank v. Wilcox*, 460.

CHRISTIANITY.

Christianity part of the law of the country.—*Held*, that Christianity in general, and not simply the tenets of particular sects, is part of the recognized law of this Province, and therefore that to an action for breach of contract to let a public hall, a plea setting up that the purpose for which said hall was intended to be used was for the delivery of certain lectures containing an attack upon the fundamental doctrines of Christianity was a good defence.—*Pringle v. The Corporation of the Town of Napanee*, 285.

COMPENSATION.

Property abutting on highway—Raising of highway—Compensation—36 Vic. ch. 48, sec. 373, O., R. S. O. ch. 174, sec. 456.]—The owners of property abutting upon a public highway were held entitled to compensation from the municipality under the Municipal Act of 1873, 36 Vic. ch. 48, sec. 373, (R. S. O. ch. 174, sec. 456), for injury sustained by reason of the municipality having, for the public convenience, raised the highway in such a manner as to cut off the ingress and regress to and from their property abutting upon the highway, which they had formerly enjoyed, and to make a new approach necessary.

A mortgagor in possession is a proper party to the arbitration in such a case, and as owner and occupier and interested in the property is entitled to compensation under the Act; and the municipality having gone to arbitration under the statute with the mortgagor, cannot move to set aside the award on the ground that he has mortgaged the property to persons who have not claimed to be parties to the arbitration.

Regina v. Municipal Counsel of Perth, 14 U. C. R. 156, and previous cases, distinguished, as decided under the Municipal Act before the 36 Vic. ch. 48, sec. 373, which first gave compensation for lands "injuriously affected."—*In re Yeomans et ux. and the Corporation of the County of Wellington*, 522.

CONDITIONS PRECEDENT.

See CONTRACT.

CONTEMPT.

Before witness can be rendered liable for, examiner must express his opinion as to propriety of his answering.—See ATTACHMENT.

CONTRACT.

Conditions precedent — Vessel — Depth of water.]—Where it was agreed that defendant was to send his vessel to Kincardine to load a cargo of salt for the plaintiffs, provided they would furnish a full cargo, at a stated price, or would guarantee 11½ feet of water in the harbour. *Held*, that the stipulations as to a full cargo and as to the depth of water, were conditions precedent to the performance of the contract, and not merely collateral or independent stipulations; and that, as there was not the depth of water guaranteed, nor such depth of water as would permit the defendant to load a full cargo, the defendant was not liable for not taking the plaintiff's salt.—*Grey et al. v. Schooley*, 209.

CONTRIBUTORY NEGLIGENCE.

Where left to jury and pronounced upon by them, verdict not interfered with.—See MUNICIPAL CORPORATIONS.

CONVICTION.

Under the Liquor License Act for inducing witness to absent himself, &c., quashed.—See ULTRA VIRES.

For selling liquor during time prohibited by License Act.—See CRIMINAL LAW, 1.

For selling liquor by retail without license, in contravention of Temperance Act.—See TEMPERANCE ACT OF 1864.

CORROBORATIVE EVIDENCE

See CRIMINAL LAW, 3.

COUNSEL.

Duty of, when dissatisfied with ruling of Judge at Nisi Prius.—See INSURANCE, 5.

COUNSEL FEES.

Right of action for—Agreement.]—H., a barrister and attorney, agreed with D., an attorney, to render D. his services at D.'s office, without confining himself to any particular branch of the business, at a weekly salary. During such employment he acted as counsel at the hearing of two Chancery suits, and in a common law suit, and some arbitrations; and after his employment had been terminated by D. he sued him for the counsel fees in these matters.

Held, that D. was not liable, the presumption being that the services sued for were performed under H.'s employment.—*Gordon v. Adams*, 203.

COURT OF REVISION.

Sittings of.—See ASSESSMENT.

CRIMINAL INFORMATION.

Libel—Criminal information.]—The Court, following recent English decisions, confining the granting of

criminal informations for libel to the case of persons occupying an official or judicial position, and filling some office which gives the public an interest in the speedy vindication of their character, or to the case of a charge of a very grave or atrocious nature, refused leave to the manager of a large railway company to file a criminal information for libel, on the ground that he did not come within the description of persons referred to.—*Regina v. Wilson*, 583.

CRIMINAL LAW.

1. *Conviction—Second offence—Imposition of fine and imprisonment at hard labour—Amendment*—37 Vic. ch. 32, sec. 34, O., 40 Vic. ch. 18, sec. 23, O.]—A conviction for selling liquor during the time prohibited by the License Act, alleging that it was for a second offence, imposed upon the defendant a penalty of \$40, and in default of sufficient distress ordered the defendant to be imprisoned in the county jail at hard labour for ten days.

Held, that under 37 Vic. ch. 32, sec. 34, R. S. O. ch. 181, sec. 52, the previous offence need not be against the same license, but may be against a license granted for a previous year; but

Held, also, that the conviction was invalid, as the Act only authorized the alternative of fine or imprisonment as a substantive punishment for the second offence, but gave no power to imprison at hard labour for non-payment of the fine.

Held, also, that the Court would not amend the conviction under 40 Vic. ch. 18, sec. 23, R. S. O. ch. 181, sec. 77, as it could not, under the circumstances, say that any other

punishment was intended by the Justices.

Quere, as to the meaning of a power to fine “not less than \$40.”

Quere, also, whether under B. N. A. Act, sec. 92, sub-sec. 14, the Provincial Legislature has power to impose imprisonment at hard labour.—*Regina v. James Black*, 180.

2. *Larceny—Evidence.*]—*Held*, CAMERON, J., dissenting, that the prisoner was properly convicted, on the evidence set out below, of the larceny of certain articles connected with a mill which he had rented from the prosecutor, and that in the manner in which the case was reported, the only question for the Court was, whether in any view of the evidence the prisoner could have been found guilty.—*Regina v. Stewart*, 574.

3. *Forgery*—32-33 Vic. ch. 19, sec. 54, D.—*Corroborative evidence.*]—On an indictment for forgery of the prosecutor’s name as endorser of a promissory note, the prosecutor swore that he had not endorsed the note; that it was not his writing; that he had never authorized the prisoner to sign his name to the note, and that he was himself unable to write his name, being in fact a marksman; and a son of his also swore that his father was unable to write his name, and was a marksman. The prosecutor also swore that on other occasions he had endorsed for the prisoner, making his mark, and had sometimes authorized the prisoner to write his name:

Held, CAMERON, J., dissenting, that a sufficient *prima facie* case was thus made out; that the prosecutor’s evidence was duly corroborated within the meaning of 32-33 Vic. ch. 19, sec. 54, D., and that the onus was then on the prisoner to shew that he

was authorized to use or write the prosecutor's name.

Per CAMERON, J., that the part of the prosecutor's evidence which required to be corroborated was not that he could not write, but that on this occasion he was not authorized, and on this point there was no corroboration.—*Regina v. Bannerman*, 547.

See FORCIBLE ENTRY.

CROWN GRANT.

Ejectment—Letters patent for adjoining lots—Description of land—Estoppel—Adding equitable defence in Term.—Ejectment to recover a piece of land claimed by plaintiff as part of lot 3, and by defendant as part of lot 4, both claiming under the letters patent for the respective lots. The plaintiff's patent issued on 2nd January, 1874, and granted it as lot 3, containing 85 acres, without any description by metes and bounds. The defendant's patent, issued on the 8th December, 1875, granted his lot as lot 4, containing 23 acres, without any specific description. It appeared that the piece in question, though not so laid out on the ground, would, according to the field notes and plan made on the original survey, have formed part of lot 4; but that the Crown Lands Department had subsequently erased a portion of the division line between the lots, and that the grants were evidently made according to the plan so altered; and that, including the land in question, lot 3 would just consist of 85 acres, while lot 4, exclusive of the piece, would consist of 23 acres. *Held*, that the piece in dispute was granted as part of lot 3.

It appeared, however, that the de-

fendant, though his patent was subsequent to the plaintiff's, was the first to purchase from the Crown; and that he and the plaintiff had been occupying the respective lots for some years previous to the issue of either patent: that the piece in dispute was sold by the Crown Land's agent to defendant as part of lot 4, and that he then took possession of it as such, continued to occupy it without any objection from plaintiff, and cleared a large portion thereof, and erected a house and barn thereon of much greater value than the land itself: that plaintiff, when applying for his patent, filed an application made by defendant that there was no one in adverse possession of lot 3, upon which the lot, including this piece, was granted to the plaintiff.

Held, that the plaintiff was estopped in equity from setting up title to the land in question as being part of lot 3; and an equitable defence, setting out these facts, was directed to be added, and a verdict to be entered thereon for the defendant.—*George Wellington Stevens v. Daniel Buck*, 1.

DAMAGES.

Measure of.—See DISTRESS, 1.

DEDICATION.

See WAYS.

DESCRIPTION OF LAND.

Ejectment—Possession—Statute of Limitations.—In a deed under which defendant claimed in ejectment the description was "The east side of the southerly part of lot 34, containing ninety acres."

Held, that this was a good description of the east ninety acres of the southerly part of the lot, and that it sufficiently appeared what the southerly part was, for the patent from the Crown was for the rear or southerly parts of lots 23 and 24 described by metes and bounds, and the deed to the defendant's grantor referred to the patent.

Held, also, that there was sufficient evidence of possession of the land by the defendant and those through whom he claimed to give a good title under the statute, and this although the possession of a portion thereof had been that of the owner of the adjoining lot 25 under the mistake that it was part of his lot, for on its being ascertained by a survey to be part of lot 24, it was immediately given up to the owner thereof, to whom the owner of lot 25 also subsequently conveyed it.—*McCracken et al. v. Warnock*, 214.

See CROWN GRANT.

DISTRESS.

1. *Notice—Waiver—Damages.*—Under 2 W. & M. sess. 1, ch. 5, goods distrained cannot be sold until the expiration of five days after a written notice of distress with the cause of the taking, shall have been given.

In this case the only notice was one given on the 8th February, and the sale took place on the 12th: *Held*, that the sale was invalid.

After the distress was made, on the tenant being informed by the bailiff that he had eight days in which to redeem, he said he did not require an inventory of the goods to be given him: *Held*, that this did

not constitute a waiver of the notice of distress.

In an action for an illegal sale of goods distrained, the measure of damages is the difference between the actual value of the goods and the amount of the rent in arrear.

Lucas v. Tarleton, 3 H. & N. 116, 27 L. J. Ex. 246, distinguished.—*Shultz v. Reddick*, 155.

2. Where the landlord distrained for six months' rent while the goods were in the tenant's possession, and afterwards, the goods being in the hands of the bailiff, an attachment in insolvency issued against the tenant: *Held*, that the assignee was not entitled to the goods, without paying or tendering the rent, and that not having done so, the landlord was entitled to proceed and sell.

Mason v. Hamilton, 22 C. P. 411, distinguished.—*McEdwards v. McLean*, 454.

DOWER.

Action against three defendants—Claim of damages against one—Averment of seisin—Pleading.—In a declaration in dower against three defendants, and suggesting that while one defendant had not, another had appeared and acknowledged the tenancy of the freehold, and consented to the demandant having judgment, and going on to declare against the third defendant, claiming damages for detention of dower, the third defendant demurred, on the ground that as the action was against three defendants, the plaintiff could not recover damages for detention of dower against him alone.

Held, affirming the judgment of GWYNNE, J., that the declaration was good, and that the objection was not

the subject of demurrer, but, if a good objection, only a ground for moving to set aside the declaration for irregularity.

Held, also, that it was not necessary to allege that the demandant's husband had died seised.—*Cameron v. Gilchrist*, 572.

EJECTMENT.

See CROWN GRANT—DESCRIPTION OF LAND—AMENDMENT—WAYS—ESTOPPEL, 2.

EQUITABLE PLEAS.

Adding in term.]—See CROWN GRANT.

ESTOPPEL.

1. *Trover against sheriff.*]—In trover for the value of a piano, sold by the defendant, as sheriff, under an execution, it appeared that an interpleader had been directed as to the piano, the plaintiff to give the usual security within twenty days for its value, to be appraised by the defendant. The defendant, though applied to, neglected to appraise the piano until it was impossible for the plaintiff to give security within the required time. Security was, however, afterwards given, but the defendant nevertheless sold the piano, contending that he was justified in so doing, as the plaintiff had not complied with the terms of the order: *Held*, that the plaintiff having been prevented by the defendant's neglect from complying with the order, defendant was estopped from saying that plaintiff's non-compliance therewith justified him in selling.

Held, also, that the effect of the defendant's neglect was either to deprive him of the protection of the order or to operate as a waiver of the time thereby limited for giving security; that if the former, he was not justified by the order in selling; if the latter, he was not justified, after the bond was allowed and filed, of which he had notice; but whether he had or had not notice of the allowance and filing of the bond, *Held*, that his duty, under the circumstances, was to have ascertained whether the payment had been made or security given before selling, and, if so, to have withdrawn from possession.

Observations on the exorbitant charge for fees and possession money made by the sheriff.—*Black v. Reynolds*, 398.

2. *Ejectment—Estoppel in pais—Statute of Limitations.*]—Plaintiff, intending to return after a short interval, left his wife and home more than thirty years ago, and went to the United States, where he remained until a short time before this action. He had never communicated with his wife or friends while absent, and was, until his return, two or three years ago, believed to be dead. Several years since, and within seven years after his departure, his wife, acting on this belief, married again, and lived with her new husband on plaintiff's farm. They both mortgaged the farm to a Building Society, which sold it under a power of sale in the mortgage. On his return, the plaintiff, brought ejectment against the purchaser from the company:—*Held* that he was entitled to recover, and that, however culpable he might have been in not communicating with his wife, his negligence did not, even as against a purchaser, under the *bonâ*

fide belief that he was dead, estop him from claiming the land. *Held*, also, WILSON, J., dissenting, that he was not barred by the Statute of Limitations, for the possession of his wife was his possession.—*McArthur v. Eagleson*, 406.

This case has been affirmed in Appeal.

See CROWN GRANT—INTERPLEADER
—INSURANCE, 3—PLEADING, 2.

EVIDENCE.

Corroborative.] — See CRIMINAL LAW, 3.

Of existence of will.]—See WILL.

Of possession.]—See DESCRIPTION OF LAND.

Admissibility of married woman's admission, signed by her in another suit.]—See MARRIED WOMAN, 2.

Of allotment of railway shares.]—See RAILWAYS AND RAILWAY COMPANIES.

Of incorporation.] — See JOINT STOCK COMPANIES.

See ASSESSMENT—MUNICIPAL CORPORATIONS—CRIMINAL LAW, 2.

EXECUTION.

Against insolvent superseded by attachment.]—See CHATTEL MORTGAGE.

FIRE INSURANCE.

See INSURANCE.

FORCIBLE ENTRY.

Restitution.] — Defendants, employees of the Great Western Rail-

the company, went upon the land in question, then in possession of the Stratford and Huron Railway Co., and occupied by its employees. No actual force was used, but the latter had good reason to apprehend that sufficient force would be used to compel them to leave, and they left accordingly.

Held, that this was a forcible entry within the Statutes relating thereto.

The Judge at the trial having granted a writ of Restitution: *Held*, that such writ is in the discretion of the presiding Judge, which had been properly exercised here.

Held, also, (1) that under the special facts and documents set out below, the Stratford and Huron Railway Co. had power to acquire the land in question, and accept a deed thereof. (2.) That the deed in question operated as a grant of the land, and not merely as a grant of a right of way over it. (3.) That the defendants were rightly convicted on the first count of the indictment.

Quere, whether the Great Western Railway Co. had any legal right to enter on the land for the purpose of building a switch, or for any other purpose, as against the Stratford and Lake Huron Railway Co., whose deed of the land was first registered.—*Regina v. Smith et al.*, 369.

FOREIGN CONTRACT.

Breach out of jurisdiction.]—Defendants, merchants in New York, telegraphed to the plaintiff, an attorney practising in Toronto, in answer to a telegram from him offering his services, to represent them in certain insolvency proceedings pending in the latter place. Plaintiff did so, and upon rendering his bill for services, which he did by letter, addressed to

defendants at New York, defendants, by letter from New York, addressed to plaintiff at Toronto, refused payment. *Held*, that the plaintiff could not recover, as both contract and breach arose out of the jurisdiction.

Held, also, following *Jackson v. Spittal*, L. R. 5 C. P. 542, that the words "cause of action" (R. S. O., ch. 20. sec. 49), do not mean the whole cause of action—i. e. breach and contract, but breach alone.—*O'Donohoe v. Wiley et al.*, 350.

FORGERY.

See CRIMINAL LAW, 3.

FRAUDULENT PREFERENCE

See INSOLVENCY, 2.

HIGHWAY.

Kingston road—Liability of County for repair—Con. Stat., C., ch. 28, Schedule A.—*Con. Stat., C., ch. 28, Schedule A*, declares that the Kingston Road east of the river Don, shall not be held to be within the city of Toronto or liberties thereof, but shall remain under the control of the Commissioner of Public Works, or of any party to whom it may be transferred by order of Governor in Council. The defendants purchased this road from the Government, and with their permission, express or implied, the city put down a sidewalk upon it.

Held, that defendants were liable for the state of the road and sidewalk, and a verdict having been rendered in favour of the plaintiffs in consequence of an injury sustained by the

way Co., in obedience to orders from female plaintiff in falling on the sidewalk, which was out of repair, the Court refused to interfere.—*Bennett et ux. v. Corporation of County of York*, 542.

Evidence of non-repair of.—See MUNICIPAL CORPORATIONS.

Raising of, so as injuriously to affect property abutting on.—See COMPENSATION.

INFANT.

Limitation of action—R. S. O. ch. 135, sec. 5.—*Held*, that under 21 Jac. I. ch. 16, sec. 7, an infant has six years after attaining his majority to bring an action for work and labour performed by him during his infancy; and that section 5 of R. S. O. ch. 135, in no way interferes with such right.—*Taylor v. Parnell*, 239.

INNKEEPER.

Fire—Death of guest—Liability.—*Held*, on demurrer to the declaration, that an innkeeper is not responsible for neglecting to warn his guest of the breaking out of a fire in the building so as to enable him to escape, and therefore that the innkeeper is not liable in an action by the guest's personal representative for damages in consequence of the death resulting from such fire.—*Hare v. Henderson*, 571.

INSOLVENCY.

1. *Insolvent law—Sale of goods—Action by assignee—Pleading.*—In an action by plaintiff, describing himself as "the official assignee of the

estate and effects of M. according to the statute in force concerning insolvents," against defendant, for a wrongful sale of goods seized by him under a distress warrant: *Held*, that a plea denying the goods to be the goods of the plaintiff as such assignee, did not put in issue the plaintiff's official character as assignee.—*McEdwards v. McLean*, 454.

2. *Fraudulent preference.*] — An insolvent, within thirty days of his solvency, executed a mortgage to the defendant for alleged money advances. A composition was agreed upon, and as collateral security therefor, the defendant assigned the mortgage to the assignee. The composition was apparently not carried out, and the plaintiff, the assignee, brought ejectment to recover the mortgaged premises, claiming both under the assignment in insolvency, and the mortgage was fraudulent against creditors: *Held*, upon the evidence set out in the case, that the mortgage was rightly found to be fraudulent as against creditors, and that the plaintiff was entitled to recover.—*Davidson v. House*, 592.

See WAREHOUSE RECEIPTS—PROPERTY PASSING—DISTRESS, 2.

INSURANCE.

Arson—*New trial*—*Statutory conditions*—*Premium note*—*Assignment*—*Notice*—36 *Vic. ch. 44, sec. 52, O.*, 39 *Vic. ch. 24, O.*]—Where, in an action on a fire insurance policy, the jury find against the defendants on a plea of arson, the Court will not, in its discretion, grant a new trial, unless the evidence so preponderates in favour of the truth of the charge as to evince, as it were, a de-

termination on the part of the jury not to give effect to the law.

A resolution was passed by the defendants, a Mutual Insurance Company, for an assessment for the year "on policies in force during the whole or any part of the year ending 31st December, 1876," not stating in words that it was on the premium notes, and was based on a scale of rates varying according to the period of the year when the policy was taken. The rate on this policy was three per cent., but in the only notice proved the rate charged was six per cent.

Held, that the assessment was valid, but the notice insufficient; and that the non-payment of such assessment therefore formed no defence.

Held, also, that an insurance company cannot set up *against the insured* statutory conditions contained in the schedule to 39 *Vic. ch. 24, O.*, unless such conditions are printed on the policy as directed by the Act. The company, therefore, were not allowed to set up one of these conditions, No. 10 (g), exempting the defendants from liability where more than five gallons of coal oil are kept on the insured premises without their permission.

Held, that where there are conditions on the policy, other than the statutory conditions, which are not printed thereon, the policy *as against the insured* must be read as if without conditions. *Held*, therefore, that the company could not set up a condition on the policy which provided that the loss should not be deemed payable until three months after the receipt of the proofs of loss.

No. 16 of the statutory conditions provided that the loss should not be payable until thirty days after completion of the proofs, unless other-

wise provided by statute or the agreement of the parties; and it was argued that the contrary was here provided both by statute and agreement; but *held*, otherwise, the statutory conditions not being printed on the policy.

Under the terms of this policy, a mutual insurance one, the losses were only to be paid within three months after due notice given by the insured according to the provisions of the Act, 36 Vic. ch. 44, sec. 52, O., relating to Mutual Insurance Companies.

Held, this defence could not be set up, for 1, There was no plea framed under that section; and 2, The operation of the section depended on the policy calling for proof of loss, which this policy did not do.—*Frey v. The Mutual Fire Ins. Co. of the County of Wellington*, 102.

2. *Application filled up by agent—Condition as to being the agent of insured—Buildings within 100 feet—Lumber on premises—Oven.*—An application for insurance filled in by the company's agent had, at the foot thereof, a notice requesting the applicant to answer the questions fully, and that if the agent should fill up the application he would be the agent of the applicant and not of the company, but it did not state that the company would not be bound by any statement made to the agent and not contained in the application. By the application the agent was asked to state his opinion of the risk, and whether he recommended the company to accept it, his answer to which was "very good." When the application was made, the lot on which the insured premises were situate, was one of eleven lots mortgaged for \$1000, but there was an arrangement with the mortgagee to release any lot

on payment of \$100 thereon. Before the insurance was effected the insured had paid \$300 on the mortgage, and intended having this lot released; and the agent who solicited the insurance and filled up the application being informed by him of all the facts said the mortgage was not worth mentioning in the application, and accordingly answered to the question as to incumbrances that there were none.

Held, that under these circumstances the company could not set up that there were any misrepresentations as to incumbrances.

One of the conditions of the policy provided that misrepresentation or concealment of facts in the application, or attempt to defraud the company, should avoid the policy. To the question in the application whether there was any building within 100 feet of the assured premises, it was answered that there were none.

Held, that the existence of a small building used as a water-closet within 46 feet of the insured premises, which had nothing to do with the fire, and in no way increased the risk, did not invalidate the policy, as the condition contemplated a fraudulent concealment only, which was not alleged, and before accepting the risk the agent, as his instructions required him, had inspected and made a survey of the premises.

At the time the insurance was effected, the house was not completely finished, so that some lumber remained on the premises, and carpenters were employed, of which the agent was fully aware, but there was no proof that the risk was thereby increased.

Held, that this did not avoid the policy.

A further condition provided that if during the continuance of the

policy the premises should be used for carrying on any trade or business whereby the risk was increased the the policy should be void. After effecting the insurance the insured built an oven on the premises, but it was safely built, and was only in use for a short time, and there was evidence to shew that it did not increase the risk. It also appeared that according to the agent's instructions he had power when the risk became more hazardous, to cancel the policy and though aware of the oven, did not do so.

Held, that this did not avoid the policy.—*Naughton v. The Ottawa Agricultural Insurance Co.*, 121.

3. 39 Vic. ch. 24.—*Absence of conditions—Averment of in declaration—Estoppel—Prior insurance—Valuation—Omission of jury to answer question—Misdirection—New trial refused.*—A policy of insurance, issued after 39 Vic. ch. 24, did not contain the conditions made necessary by the statute: *Held*, that the fact of the declaration having stated that the policy was subject to conditions, which it set out, did not preclude the plaintiff from contending there were no conditions upon the policy, for an amendment would be allowed in order to state the contract proved according to its legal effect.

Plaintiff having represented his loss at a much larger sum than the jury found he had sustained, the Court nevertheless refused to interfere on this ground, as the jury at the same time found that he acted honestly in making the representation, and the evidence in the opinion of the Court sustained that finding.

The omission to communicate the fact of an existing insurance with another company is not *per se* such a wrongful concealment as to sustain

a plea of fraud; and where, as in this case, the plea is not rested on any ground of breach of warranty, but on a misrepresentation of facts material to the risk, the materiality is a matter depending on evidence, and there being no evidence on that point here, the Court also refused to interfere.

Excessive valuation does not avoid a policy, unless shewn to have been excessive to the knowledge of the assured.

The mere omission of the jury to answer one of the questions submitted to them is no ground for a new trial; but whether the omission of the jury should have that effect, where the verdict is that of the Judge, must depend on the nature of the question and the character of the evidence bearing upon it, whether the question be an unnecessary one or one going to the foundation of the recovery, and the evidence to it contradictory.

Held, that it was no misdirection to leave to the jury the question of value of property destroyed, although the same had been found by arbitrators under the condition of the policy; first, because there was no condition affecting either this or any other matter; secondly, because, even if there were, the award could not be held to be valid, inasmuch as the arbitrators had received no evidence and turned the parties out of the room during the investigation.—*Parsons v. The Citizens' Ins. Co.*, 261.

4. *Misrepresentation—Warranty—Adverse witness—Discretion of Judge at trial—Right to review.*—To a question asked of the plaintiff, on his application for insurance, whether there was any incendiary danger either threatened or appre-

hended, the answer was in the negative, but the evidence shewed the contrary in both respects. The contract of insurance made the answer a warranty.

Held, that he could not recover.

The Court will not review the discretion of the Judge at the trial in receiving evidence to contradict a party's own witnesses as being adverse, nor in receiving evidence on the part of the defence after the close of the plaintiff's case, even though for the purpose of corroborating the defence.—*Herbert v. The Mercantile Fire Ins. Co.*, 384.

5. *Interim receipt—Prior assurance—Notice of—Statutory conditions.*—In an action on an interim receipt for insurance against fire, it appeared that the application represented that there were four other insurances, but had not correctly stated the amount insured in the different companies, but annexed to the application and delivered to the company's agent at the same time, was a memorandum giving them accurately :

Held, that the memorandum was part and parcel of the application, and the agent having received and accepted the premium, must be taken to have assented to it, and his act, under the circumstances, be held, so far as the interim receipt and the right of the plaintiffs thereunder were concerned, to be the act and assent of the defendants.

The interim receipt stated that the plaintiff was insured subject to all the usual terms and conditions of the company :

Held, that, treating the receipt as subject to the statutory conditions, the 8th condition, as to the assent of the company appearing in or being indorsed on the policy, had been sufficiently complied with.

Held, also, that the 13th statutory condition, requiring the assured to give notice of his loss and to deliver "as soon afterwards as practicable" a particular account, was complied with by delivering such account within a reasonable time.

Observations on the duty of counsel when dissatisfied with the ruling of the Judge at Nisi Prius.—*Parsons v. The Queen Ins. Co.*, 271.

6. *Loss, if any, payable to a third party—Cancellation—Right of insured to recover.*—The plaintiffs effected an insurance with defendants, "loss, if any, payable to H.," as security for goods supplied by H. to them. The policy was held by H. and was handed over, it appeared, by some mistake of the latter's clerk, among a number of other policies effected by H., to defendants for surrender or cancellation: *Held*, that plaintiffs were entitled to recover, and that it was not necessary to bring the action in the name of H., whose interest, if any, was wholly contingent on the state of his account with the plaintiffs when the right of action accrued.

Held, also, that in the case of a policy such as this, the payee cannot deal with it as his own, and agree to its cancellation. He may surrender his claim under it, but the owner of the property who is named as the insured, if he retain his interest in the property, is entitled to the insurance to the extent of such interest.—*Marrin et al. v. Stadacona Ins. Co.*, 556.

7. *Statutory conditions—R. S. O. ch. 162.*—To a question contained in an application for insurance, "For what purpose are the premises occupied?" the answer was "Dwelling, &c.," which the learned Judge found

to mean "&c." *Held*, that this meant dwelling, *et cetera*, and that on the evidence as to what passed between the applicant and the agent, notice was given that the premises were occupied for another purpose also—a drinking saloon, as it appeared.

It also appeared that the company's agent had the fullest knowledge of the existence of the saloon, and that it had been the subject of discussion between such agent and the applicant, and further, that the chief agent had certified on the back of the application that he had personally inspected the premises and recommended the risk.

Held, that there was no breach of the first statutory condition. (R. S. O. ch. 162,) and that plaintiff was entitled to recover.—*Gouinlock v. The Manufacturers and Merchants Mutual Ins. Co. of Canada*, 563.

8. *Prior insurance—Substitution.*]
—*Held*, that an unintentional error on the part of the applicant for insurance in the name of one of the companies in which he was already insured, where the true amount of the prior insurance was given, did not vitiate the policy.

Held, also, that the true amount already upon the property being given, the fact that one policy was allowed to drop or be cancelled, and another for a like amount to take its place in a different company, did not avoid the contract of insurance because of the noncommunication to the insurers of the substituted policy, but that the statutory condition had been substantially complied with, it being really directed against the increase of the risk without the consent of the insurer.—*Parsons v. Standard Ins. Co.*, 503.

This case has been appealed.

See PLEADING, 2.

INTERPLEADER.

Common law and Chancery writs—Jurisdiction—Estoppel—R. S. O. ch. 54, secs. 11, 12, 13.—After the issue of an interpleader summons founded on two writs of *fi. fa.* issued respectively out of this Court and the Court of Chancery, the writ from this Court was set aside: *Held*, that the Judge in Chambers had jurisdiction, notwithstanding, to continue the proceedings and make the interpleader order as to the latter writ; but *quære*, even if the want of jurisdiction had been clear, whether a party could avail himself of it after having agreed to the order, accepted the issue, defended it at the trial, and moved against the verdict, &c.—*Haldan v. Beatty*, 614.

See SALE OF GOODS.

JOINT STOCK COMPANIES.

Joint Stock Gas Company, under C. S. C. ch. 63—Powers—Liability—of shareholders to creditors—Liability of trustee.—In 1872 five persons filed in the Registry office a declaration that they were desirous of forming a joint stock company, under Consol. Stat. C., ch. 63, by the name of the Dominion Safety Gas Company, for the object of "the manufacture and (or) sale of the machinery and materials for the manufacture or production of gas from evaporating fluids, and gas fixtures of all kinds and such other articles as may from time to time be deemed advisable; and also the lighting of cities, towns, villages, streets, capital buildings, steamboats, coaches, and street and railroad cars, with gas," with a capital stock of \$6000, in 300 shares of \$20 each, and three of the defendants were stated to be trustees.

Subsequently these trustees met and passed by laws as to the government of the company. On 17th February, 1873, a meeting of the shareholders was held, when an agreement was entered into for the purchase of a patent for the manufacture of gas, and a resolution was passed that the shareholders should pay on their stock enough to make a working capital of \$1250. An agreement was made that the stock should be divided up between the five defendants in proportions stated, and these defendants, as shareholders, subsequently met, increased the number of trustees from three to five, and elected themselves such trustees. No stock was ever subscribed for or anything ever paid thereon, the money required to carry on the business being raised from time to time by contribution. The company, in 1874, put up a gas machine in the plaintiff's residence, which, on 12th February, 1874, exploded and injured the plaintiff, for which he sued the company and recovered damages, and on 29th February, 1876, judgment was entered, and a *fi. fa.* goods issued against the company, which was returned *nulla bona*. This action was then brought against defendants, as shareholders for the amount of the unpaid stock, and also as trustees on their individual liability under the Act for neglecting to publish within twenty days after the 1st January, 1875, as required by the Act, a report stating the amount of the capital stock actually paid and of the then existing debts of the company, or to insert therein plaintiff's claim as one of such existing debts.

Held, that the company was duly incorporated under Consol. Stat. C. ch. 63, for though the Act did not authorize the formation of a company for lighting cities, &c., with gas, it

did for the other objects stated, and the corporation could exist for such objects alone.

Held, also, that the evidence set out below was sufficient to shew such incorporation.

Held, also, that the defendants were not liable as shareholders in the company to the plaintiff, as a creditor; for to create such a liability, under the statute, there must be a subscription for stock; and the fact that they had acted and been treated as shareholders would not enable a creditor to proceed against them as such.

Held, also, that neither were they liable as trustees for neglecting to make the report, for the plaintiff's claim was not an existing debt at the time of such neglect, nor until the entry of his judgment.—*Osler v. Howell et al.*, 40.

JUDGE.

Court will not review discretion of, at the trial, in receiving evidence on part of defence after close of plaintiff's case.—See INSURANCE, 4.

See INSURANCE, 5.

JURISDICTION.

See INTERPLEADER.

KINGSTON ROAD.

See HIGHWAY.

LANDLORD AND TENANT.

Devise in trust—Refusal to accept—Nonjoinder—Continuance of tenancy—Right of devisees in trust to

recover rent.].—One of the devisees in trust under a will refused to accept the trust: *Held*, that he was not a necessary party plaintiff in an action for rent of the premises devised, although his formal renunciation in writing was not made until after the rent in question had accrued due.

Defendant was tenant from year to year of the premises in respect of which the rent in question was sought to be recovered, being for three quarters accruing due after the death of the lessor. No notice to quit was given, nor was the tenancy determined by the consent of the parties entitled; on the contrary, the defendant recognized the continuance of the tenancy by the payment of rent falling due after the lessor's death: *Held*, that the tenancy was not determined by the death of the lessor, and that the plaintiffs, the devisees in trust under the lessor's will, were entitled to recover the three quarters' rent in use and occupation:

Held, also, that it was no answer for the defendant that he had ceased to occupy, for he still held by the plaintiffs' permission and might have occupied had he so pleased.—*Hughes et al. v. Brooke*, 609.

LARCENY.

See CRIMINAL LAW, 2.

LEASE.

See WAREHOUSE RECEIPTS.

LIBEL.

See CRIMINAL INFORMATION.

LIMITATIONS, STATUTE OF.

See ESTOPPEL, 2—DESCRIPTION OF LAND—INFANT.

LOAN.

Gratuitous loan—Increase.].—In the case of a gratuitous loan all the increase and offspring of the loan, and everything accessional to it (in this case a pair of mares, offspring of a mare loaned, and portion of a set of harness acquired as payment for the use of oxen,) belong to the lender, and must be returned at the determination of the loan, and are not subject to seizure under execution against the bailee.—*Dillaree v. Doyle*, 442.

LOCAL LEGISLATURE.

See ULTRA VIRES.

MANDAMUS.

See VOTERS' LIST.

MARRIED WOMAN.

1. *Promissory note—Separate estate—Liability as indorser.*].—A married woman, possessed of separate estate, acquired by her after the Married Woman's Act of 1872, indorsed a note for the accommodation of her husband, member of a firm to whom credit was given on the faith of such separate estate and her indorsement in reference thereto:

Held, that she was liable.

Kerr et al. v. Stripp, 40 U. C. R., affirmed.—*Frazee et al. v. McFarland et al.*, 281.

2. *Sale of goods to—Separate estate—Examination in another suit—Admissibility in evidence.*]—Defendant, a married woman, possessed of real estate in Ontario, but living with her husband in Montreal, purchased goods from the plaintiff there, for domestic purposes. There was no evidence of a settlement making the real estate separate estate, or that the marriage took place after the 2nd March, 1872; nor was the debt contracted with reference to her separate estate.

Held, that defendant was not liable to be sued for the price of the goods.

The only evidence of defendant's ownership of real estate was her admission, signed by her when under examination in another suit.

Held, clearly admissible.—*Brown et al. v. Winning*, 327.

MEASURE OF DAMAGES.

In an action for illegal sale of goods distrained.]—See DISTRESS, 1.

MEMORANDA.

518, 521.

MISDIRECTION.

Leaving to jury the question of value of property destroyed, though the same had been found by arbitrators under the condition of the policy, is no misdirection.]—See MUNICIPAL CORPORATIONS.

MORTGAGOR.

See COMPENSATION.

MUNICIPAL CORPORATIONS.

Highway—Want of repair—Death resulting from—Contributory negligence—Evidence.]—Plaintiff's husband was found dead in a ditch along defendants' highway, the hub of his waggon wheel resting upon him, the waggon being in a dilapidated condition, and he fastened down very tightly. One of his horses was dead. The ditch was about 12 feet deep and 32 feet wide, much wider at the top than at the bottom, and extending about half way into the travelled road, which it appeared had been in this condition for several years. There was no railing or other guard round the ditch, and nothing to indicate the situation on a dark night, such as the night in question was. It was alleged that deceased was under the influence of liquor, though there was contradictory evidence on this point; but there was no direct evidence as to how he fell into the ditch.

Held, that there was evidence for the jury of non-repair of the road within the meaning of the present Municipal Act, and that such non-repair was the cause of the death; and that, assuming there was a breach of duty on defendants' part, deceased having been lawfully using the highway, it might be fairly inferred that but for such breach of duty the accident would not have occurred.

The question of contributory negligence having been left to the jury, and found in plaintiff's favour, the Court refused to disturb the verdict.

Remarks as to what is misdirection on the part of the Judge at the trial.—*Lucas v. The Corporation of the Township of Moore*, 334.

This case has been reversed in Appeal, and a new trial granted.

See COMPENSATION.

NEW TRIAL.

On a finding against defendants, in action on a fire policy, on a plea of arson, the Court will not, in its discretion, grant a new trial, unless the evidence so preponderates in favour of the truth of the charge as to evince determination on jury's part not to give effect to the law.]—See INSURANCE, 1.

Refused on ground of discovery of new evidence, when not shewn that the evidence could not have been procured before the trial, &c.]—See AMENDMENT.

No ground for, that the jury omitted to answer one of the questions submitted to them.]—See INSURANCE, 3.

NONJOINER.

See LANDLORD AND TENANT.

PLEADING.

1. *Deed of guarantee for plaintiffs' agent—Averment of proof of loss.]—*The second count of a declaration, after referring to a deed set out in the first count, by which defendants covenanted to re-imburse to the plaintiffs any loss, not exceeding \$600, which the plaintiffs should sustain by any act of fraud or dishonesty on the part of one H. who had been appointed the plaintiffs' agent—such re-imbursement to be made within three months after proof should be given to the satisfaction of defendants' directors of such loss—alleged that H. received and appropriated to his own use certain moneys of the plaintiffs: that the plaintiffs gave proof of their loss to defendants, and

defendants thereupon repudiated all liability and alleged as a reason that the plaintiffs had forfeited all right under said deed by non-compliance with certain conditions not relating to such proof, and did not require any further proof of said loss, and thereby waived all further proof thereof by the plaintiffs, &c.

Held, on demurrer, that compliance with the deed in giving proof of the loss was sufficiently averred to call upon defendants to plead.—The Manufacturers and Merchants Mutual Fire Ins. Co. v. The Canada Guarantee Co., 247.

2. *Mutual insurance policy—Avoidance by fraud—Waiver by subsequent assessment.]—*To a declaration on a policy of insurance in a Mutual Company defendants pleaded that the plaintiff induced them to enter into the contract by representing and warranting to them certain facts relative to the insured premises, material to be made known to defendants and to the risk, which were false and fraudulent, whereby the policy was avoided. A further plea, after setting up the representation and warranty as in the former plea, averred that the plaintiff promised and agreed that the premises should continue as represented and warranted, and that in the belief that he would perform the same the defendants made the policy, but that, after the making thereof, the plaintiff ceased to keep the premises in the condition represented and warranted, thereby increasing the risk, whereby, &c. To each of these pleas the plaintiff replied, by way of estoppel, that after such representation and warranty, and after the loss, and after defendants had acquired full knowledge of the breach and falseness of said representation and war-

ranty, defendants levied an assessment on the premium note given by plaintiff to cover losses by defendants to a date named, before which day the plaintiff had sustained said loss; and notified him that unless such assessment should be paid within thirty days his insurance would be void; and that within said thirty days he paid, and defendants received said assessment.

Held, on demurrer, replications good, as shewing that defendants, with full knowledge of the breaches of warranty, had elected, as they might, to treat the insurance as existing.—*Hopkins v. The Manufacturers and Merchants Mutual Fire Ins. Co.*, 254.

See DOWER—INSOLVENCY, 1—INN-KEEPER.

POSSESSION.

Evidence of.]—See DESCRIPTION OF LAND.

PREFERENCE.

See INSOLVENCY, 1.

PROMISSORY NOTES.

See BILLS AND NOTES, 1, 2—MARRIED WOMAN, 1.

PROPERTY PASSING.

Railway—Subscription for stock—Insolvency.—The defendant was named as one of the provisional directors of the Toronto, Grey, and

Bruce R. W. Co., by their Act of Incorporation, and was afterwards elected and acted as director thereof, having subscribed for stock to the extent of \$1,000, on which he paid, partly in money and partly by certain allowances made for his services as such director and otherwise, the sum of \$400. Subsequently to this, defendant made an assignment under the Insolvent Act of 1869. Before doing so, however, he had procured the execution by the required majority of his creditors of a deed of composition and discharge, apparently under sec. 94 of the Act. The plaintiff, as a creditor of the same company, sued out a writ of *sci. fa.* against the defendant to compel payment to him of the balance due upon the said stock. The defendant pleaded that he was not a shareholder in the said company, his contention being, that the property in the said stock had passed to the assignee. It did not appear whether or not the assignee had accepted or rejected this stock, or had done any act beyond accepting the assignment made to him. The defendant had obtained his discharge in the usual way, the unpaid balance upon the stock, however, not having been scheduled as a liability of defendant, and no claim having been proved in respect of it:

Held, that the plaintiff was entitled to recover, and that the property in the said stock had not passed to the official assignee.—*Denison v. Smith*, 503.

See SALE OF GOODS.

PUBLIC POLICY.

Transaction void as against.]—See BARRISTER.

PUBLIC SCHOOLS.

Union school sections—40 Vic. c. 16, s. 11, sub-sec. 4, O.; 37 Vic. c. 28, sec. 74, O.]—On the 1st November, 1874, a Union School Section was formed by adding to section 6 in the township of Verulam several lots in the township of Harvey. The village of B., which became incorporated on the 1st January, 1877, was all in Verulam, and before such alteration formed part of said section 6. In 1874, before the alteration, section 6 had raised by a by-law \$5000 to build a school house, and in 1876 the plaintiff was assessed by the Union section so formed in respect of the lots thus added, part of his assessment being for said loan.

Held, that the Union section existed in fact on the 2nd March, 1877, when the 40 Vic. ch. 16, sec. 11, sub-sec. 4, O., was passed: that its existence was not altered by the incorporation of the village: that under that statute, though illegally formed, it must be decreed to have been legally formed; and that the rate thereof was legal.—*Boyd v. The Public School Board of the Village of Bobcaygeon in the County of Victoria*, 35.

RAILWAYS AND R. W. COMPANIES.

Action by creditor against shareholder—*Proof of defendant being a shareholder*—C. S. C. ch. 66.]—In an action against defendant as a shareholder of ten shares for unpaid stock, it appeared that defendant signed the stock book, which was headed with an agreement by the subscribers to become holders of the stock for the amounts set opposite their respective names, and upon

allotment by the company “of my or our said respective shares,” to pay the company ten per cent. of the amount of said shares, and all future calls. The company subsequently passed a resolution instructing the secretary to issue allotment certificates to each shareholder for the shares held by him. The secretary accordingly prepared such certificates, which respectively represented that the company, “in accordance with your application for — shares, have allotted to you shares amounting to,” &c. These were handed to the company’s broker to deliver to the shareholders and collect the ten per cent. It did not appear that the certificate was ever delivered to defendant, or that he was ever expressly notified of the allotment, but he was with the rest of the shareholders, from time to time, notified of the calls, to which he paid no attention, and had never paid anything on the stock; and some years afterwards, on being requested by the secretary to pay up his stock, he stated that he did not consider that he ought to pay anything, but gave no reason why.

Held, that there was sufficient evidence of notice to defendant of the allotment; and that it was not *ultra vires* of the directors to take defendant’s subscription for stock without at the same time receiving payment of the ten per cent. thereon. The defendant was therefore held liable.—*Denison v. Lesslie*, 22.

See PROPERTY PASSING.

RESTITUTION.

Writ of.]—See FORCIBLE ENTRY.

RULES OF COURT.

519, 520.

SALE OF GOODS.

Interpleader—Sale of goods—Property passing—Warehouse Receipts.]—Plaintiffs contracted for the manufacture of a quantity of glassware, which, though invoiced to and paid for by plaintiffs, was stored with a warehouseman as the goods of the manufacturers, who obtained warehouse receipts for them. These receipts were transferred by the manufacturers to defendants, as collateral security for advances made to them.

Held, in an interpleader to try the right to the goods, that there had not been a sufficient delivery of the goods to pass the property in them to the plaintiffs, and that the defendants were therefore entitled to succeed.—*Gowans et al. v. Consolidated Bank of Canada*, 318.

See MARRIED WOMAN, 2.

SCHOOLS.

See PUBLIC SCHOOLS.

SECONDARY EVIDENCE.

Of will.]—*See* WILL.

SEPARATE ESTATE.

See MARRIED WOMAN, 2.

STAMPS.

See BILLS AND NOTES, 1—CHATTEL MORTGAGE.

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STATUTE OF LIMITATIONS.

See ESTOPPEL, 2.

STOCK.

Property in.]—*See* PROPERTY PASSING.

STATUTES.

2 W. & M. sess. 1, ch. 5.]—*See* DISTRESS, 1.

21 Jac. I. ch. 16, sec. 7.]—*See* INFANT.

B. N. A. Act, sec. 92, sub-sec. 14.]—*See* CRIMINAL LAW, 1.

Insolvent Act of 1875, sec. 125.]—*See* WAREHOUSE RECEIPTS.

Con. Stat. C. ch. 28, Schedule A.]—*See* HIGHWAY.

Con. Stat. C. ch. 63.]—*See* JOINT STOCK COMPANIES.

Con. Stat. C. ch. 66.]—*See* RAILWAYS AND R. W. COMPANIES.

Con. Stat. U. C. ch. 22, sec. 160.]—*See* ARBITRATION AND AWARD, 2.

Con. Stat. U. C. ch. 24, secs. 12, 31.]—*See* APPEAL.

32-33 Vic. ch. 19, sec. 54, D.]—*See* CRIMINAL LAW, 3.

34 Vic. ch. 5, D.]—*See* WAREHOUSE RECEIPTS.

36 Vic. ch. 44, sec. 52, O.]—*See* INSURANCE, 1.

36 Vic. ch. 48, sec. 373, O.]—*See* COMPENSATION.

37 Vic. ch. 19, sec. 11, O.]—*See* ASSESSMENT.

37 Vic. ch. 28, sec. 74, O.]—*See* PUBLIC SCHOOLS.

37 Vic. ch. 32, secs. 24, 25, O.]—*See* TEMPERANCE ACT OF 1864.

39 Vic. ch. 11, sec. 5, O.]—*See* VOTERS' LIST—INSURANCE, 1, 3.

39 Vic. ch. 24, O.]—*See* INSURANCE, 1, 3.

39 Vic. ch. 28, sec. 7, O.]—*See* ARBITRATION AND AWARD, 3.

40 Vic. ch. 6, O.]—*See* ARBITRATION AND AWARD, 3.

40 Vic. ch. 10, sec. 1, O.]—*See* VOTERS' LIST.

40 Vic. ch. 16, sec. 11, sub-sec. 4, O.]—*See* PUBLIC SCHOOLS.

40 Vic. ch. 18, sec. 30, O.]—*See* TEMPERANCE ACT OF 1864.

41 Vic. ch. 6, sec. 3, O.]—*See* ARBITRATION AND AWARD, 3.

R. S. O. ch. 20, sec. 49.]—*See* FOREIGN CONTRACT.

R. S. O. ch. 50.]—*See* ATTACHMENT.

R. S. O. ch. 50, sec. 192.]—*See* ARBITRATION AND AWARD, 3.

R. S. O. ch. 51, sec. 26.]—*See* WILL.

R. S. O. ch. 54, secs. 11, 12, 13.]—*See* INTERPLEADER.

R. S. O. ch. 135, sec. 5.]—*See* INFANT.

R. S. O. ch. 162.]—*See* INSURANCE, 7.

R. S. O. ch. 174, sec. 456.]—*See* ARBITRATION AND AWARD, 1—COMPENSATION.

R. S. O. ch. 181, secs. 52, 57, 59, 77.]—*See* CRIMINAL LAW, 1—ULTRA VIRES.

TEMPERANCE ACT OF 1864.

Conviction under 37 Vic. ch. 32, O., for "selling liquor without a license," where Temperance Act in force—Constitutionality of 40 Vic. ch. 18, sec. 30, O.]—The proper construction of 40 Vic. ch. 18, is either that a wholesale license must be taken out in municipalities where the Temperance Act of 1864 is in force, for the quantities to be sold therein under that Act, and making a sale thereof without license a contravention of the 24th and 25th secs. of 37 Vic. ch. 32, O., as a selling by wholesale without license; or as providing in addition that a sale in such municipalities of the quantities prohibited

by the Temperance Act should be a contravention of the said 24th and 25th sections, as a selling by retail without license.

Where, therefore, the defendant was convicted of selling liquor by retail without a license in a municipality where the Temperance Act was in force. *Held*, reversing the formal judgment of WILSON, J., that the conviction was invalid, and must be quashed, for if the former were the intention of the Legislature, then the conviction was bad, as it was for selling by retail under a provision of the License Act not in force where the conviction was made; and if the latter, the Legislature were exceeding their powers in directly legislating on criminal law, and enacting criminal procedure for the punishment of offences against the Temperance Act.—*Regina v. Lake*, 515.

TENDER.

Plea of.]—See ASSESSMENT.

TIME.

For moving against award.]—See ARBITRATION AND AWARD, 2.

TRESPASS.

See WAREHOUSE RECEIPTS.

TROVER.

See WAREHOUSE RECEIPTS—ESTOPPEL, 1.

ULTRA VIRES.

Conviction—Inducing witness to absent himself—Power of Local Legislature—R. S. O. ch. 181, secs. 57, 59—Amendment of conviction.—By section 57 of R. S. O. ch. 181, The Liquor License Act, any person who in any prosecution under the Act tampers with a witness either before or after he is summoned or appears as such witness on any trial or proceeding under the Act, or by the offer of money or by threats, or in any other way induces or attempts to induce any such person to absent himself, or swear falsely, shall be guilty of an offence under the Act, and liable to a penalty of \$50; and by section 59 such penalty is recoverable in default of distress by imprisonment not exceeding thirty days.

Held, affirming the judgment of GWYNNE, J., that this was *ultra vires* of the Local Legislature, for the acts declared by section 57 to be offences were criminal offences at common law, and within the exclusive jurisdiction of the Dominion Legislature, and were not brought within the Local Legislature by sub-section 15 of section 92 of the B. N. A. Act, either as coming under municipal institutions, or as being enactments to enforce the law as to shop, saloon, &c., licenses, in order to raise a revenue for provincial, local, or municipal purposes.

A conviction, therefore, under the Act for inducing a witness to absent himself, &c., was quashed.

Quære, per GWYNNE, J., whether under section 77 a conviction imposing an unauthorized sentence, such as imprisonment at hard labour, could be amended on motion to quash by striking out the words "with hard labour."—*Regina v. Lawrence*, 164.

See RAILWAYS AND R. W. COMPANIES.

USE AND OCCUPATION.

See LANDLORD AND TENANT.

VOTERS' LIST.

Application for mandamus to correct—39 V. ch. 11, s. 5, 40 V. ch. 10, s. 1, O.]—Under 39 Vic. ch. 11, sec. 5, O., as amended by 40 Vic. ch. 10, sec. 1, O., persons qualified to vote, whose names are omitted from the voters list, must, in order to have the omission rectified, notify the clerk of the municipality within thirty days after the posting by him of the said list, of their intention to make application therefor.

In this case the applicant's name, which was properly on the assessment roll for income, was, without any notice to him, erased by the Court of Revision, and was in consequence omitted by the clerk from the voter's list. The applicant did not discover the omission until after the expiration of the thirty days, when he made application to the clerk to have his name inserted in the list, and on his refusal to do so, he applied for a mandamus to the County Judge and clerk to make the insertion.

Held, that the application must be refused.—*In the matter of Thomas Blair Browning and the Judge of the County Court of the County of Wentworth, and the Clerk of the Municipality of the Town of Dundas*, 13.

WAIVER.

Of notice of distress.—See DISTRESS, 1.

Of avoidance of insurance.—See PLEADING, 2.

WAREHOUSE RECEIPTS.

Insolvent Act of 1875.] — The Canada Car Company had, for some years, been doing business with the Royal Canadian Bank, and with its successors, the Consolidated Bank, and had obtained discounts to the amount of \$23,000 on the security of warehouse receipts given by one C. on 14,000 car wheels and 350 tons of pig iron. When these receipts were given, C. was not in possession of either the goods or the premises on which they were stored. A lease of the premises was subsequently made to him, but he refused to renew the receipts and gave up the property. At the instigation of the Consolidated Bank, to enable the plaintiff to give warehouse receipts, a lease of the premises at the rent of \$5 per month was made to him for a year, and he gave a warehouse receipt to the company for 14,000 car wheels and 350 tons of pig iron, receiving an indemnity from the bank that the property would be forthcoming when required. This receipt was endorsed over to the Standard Bank, by the Car Wheel Company, under the signature of its manager and president, and an advance obtained thereon of \$23,000, which went to pay the Consolidated Bank, who, as it was found, were aware of the Company's insolvency. In February, 1877, an attachment in insolvency issued against the company, and the defendants, as their assignees in insolvency, took possession of the goods covered by this receipt, claiming them as part of the assets of the estate. The plaintiff then sued the defendants in trespass and trover for the taking.

Held, that defendants were entitled to the goods: that had the Consoli-

dated Bank been assignees of the receipt they would have had no title to the goods, as upon the evidence the receipt would not have been given, as required by the Act, 34 Vic. ch. 5, D., to secure a present advance or debt.

Held, also, that the Standard Bank could be in no better position, for that the evidence, set out in the case, shewed that the advance by them was not made as an original and independant transaction with the Car Wheel Company, but at the request and for the benefit of the Consolidated Bank, and upon its express or implied guarantee of indemnity.

Held, also, that the lease to the plaintiff was not open to objection as being merely a gratuitous one.

Quære, whether M., as regarded the premises leased, could be considered a warehouseman, or a keeper of a yard within that title.

Quære, also, whether there could be a valid legal transfer of the warehouse receipt, except under the corporate seal; but held that this was immaterial, as this objection would not in equity defeat the plaintiff's claim.

Held, that if plaintiff had had a legal title to the goods, he would not be compelled to resort to the Insolvent Court under section 125 of the Insolvent Act, but might maintain this action. — *Milloy v. Krer et al.*, 78.

See SALE OF GOODS.

WAREHOUSEMAN.

See WAREHOUSE RECEIPTS.

WARRANTY.

See INSURANCE, 4.

WAYS.

Dedication—Acceptance by public—Ejectment.—In order to widen a street in the City of St. Catharines, the plaintiff and other owners of the land on each side of the street, agreed to give the corporation a strip of land bordering thereon, not exceeding five feet in depth. The street some forty years ago had been dedicated by the then owner of the land to the public, and a plan thereof made, by which the plaintiff appeared to be some 7 feet on the street, but as the street was actually laid out on the ground and used by the public the 7 feet was included within the owner's fence and had continued so ever since. The corporation claimed that this 7 feet was part of the street, and that they were therefore entitled to take from the plaintiff under the agreement 5 feet in rear of the 7 feet.

Held, in ejectment, that this 7 feet could not, under the circumstances, be deemed to be part of the street, not having been used or accepted by the public as such, and that the corporation under the agreement could only take the five feet bordering on the street as it then existed.—*Hastings v. The Corporation of the City of St. Catharines*, 134.

WILL.

Sufficiency of search for—Memorial executed by heir-at-law—Declaration against interest—Evidence.—In ejectment, in proof the existence of a will, one H. swore that she saw

the will, giving an explicit statement of its contents, and it also appeared that the devisees, of whom the heir-at-law was one, all submitted to and acted upon it :

Held, sufficient evidence of the existence of the will.

Held, also, that the will was sufficiently proved by the execution and registry by the heir-at-law of a memorial of the will, it being a declaration against his proprietary interest, and he being dead at the time of the trial.

Seemle, it was, on this ground, good primary evidence not only against the heir-at-law and those claiming under him, but against third parties.

It appeared that search for the will was made in the office in which it would have been had it been admitted to probate ; in the different registry offices of the counties in which the several parcels of land, of which the testator died siesed, were situate ; among the papers of the owners of the several parcels ; among the papers of the only executor of three named in the will who could be found ; among the papers of the draftsman of the will, and among those of several of the devisees : *Held*, sufficient to let in secondary evidence of the will.

Held, also, that plaintiff's case was within sec. 26, ch. 51, R. S. O., under which they had served notice.—*Brown v. Morrow*, 436.

WITNESSES.

Foreign bank president admissible to prove what is money in foreign country.—See BILLS AND NOTES, 1.

WORDS, MEANING OF.

"Property," (C. S. U. C., ch. 24,
sec. 12.])—See APPEAL.

Power to fine "not less than \$40."]
—See CRIMINAL LAW, 1.

"Cause of action," (R. S. O., ch.
20, sec. 49.])—See FOREIGN CON-
TRACT.

WRIT OF RESTITUTION.

See FORCIBLE ENTRY.

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